Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No.

OTIS R. BOWEN as Governor of the State of Indiana;
THEODORE L. SENDAK, as Attorney General of the State of Indiana;
HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana;
THE INDIANA STATE BOARD OF EDUCATION, a public corporate body,

Petitioners,

vs.

UNITED STATES OF AMERICA,
and
DONNY BRURELL BUCKLEY,
ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES OF AMERICA,
and
DONNY BRURELL BUCKLEY,
ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners[1], Otis R. Bowen, as Governor of the State of Indiana; Theodore L. Sendak, as Attorney General of the

[1]Petitioners filed a Notice of Appeal to this Court on July 26, 1976, but subsequently decided to file a petition for a writ of certiorari instead of a jurisdictional statement. If this court determines that review of this case should be by appeal, then Petitioners request that this Petition be treated as a jurisdictional statement.

State of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; and The Indiana State Board of Education, a public corporate body (hereafter State Defendants) respectfully pray this Court issue a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) issued in cause numbers 75-1730 through 75-1737, 75-1765, 75-1936, 75-1964, 75-1965 and 75-2007 on July 16, 1976, which affirmed the Judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division (hereafter District Court) entered on August 1, 1975.[2]

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[2]The parties in the Seventh Circuit who are considered respondents herein are: United States of America; Donny Brurell Buckley, Alycia Marquese Buckley, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein; The Board of School Commissioners of the City of Indianapolis, Indiana; Karl R. Kalp, as Superintendent of Schools; Erle A. Kightlinger, as President of the Board of School Commissioners; Jessie Jacobs, Carl J. Meyer, Paul E. Lewis, Lester E. Neal, Constance R. Valdez, W. Fred Ratcliff, Members of the Board of School Commissioners of the City of Indianapolis; The Metropolitan School District of Lawrence Township, Marion County, Indiana; The Metropolitan School District of Perry Township, Marion County, Indiana; The Metropolitan School District of Warren Township, Marion County, Indiana; The Metropolitan School District of Wayne Township, Marion County, Indiana; The Metropolitan School District of Decatur Township, Marion County, Indiana; The Franklin Township Community School Corporation, Marion County, Indiana; The Metropolitan School District of Washington Township, Marion County, Indiana; The School Town of Speedway, Marion County, Indiana; The School City of Beech Grove, Marion County, Indiana; Citizens for Quality Schools, Inc.; Coalition for Integrated Education; Indiana State Teachers Association.

OPINIONS BELOW

The opinion of the Seventh Circuit issued on July 16, 1976, has not been officially reported. A copy of that opinion may be found in the Appendix attached to the Jurisdictional Statement filed in No. 76-212 by the Metropolitan School District of Perry Township, at page A1 (hereafter Perry App. p. ——).

The decision of the District Court which gave rise to the appeal to the Seventh Circuit was issued on August 1, 1975, and is not reported, but may be found at Perry App. p. A36.

Other decisions by the District Court and the Seventh Circuit in the cause are 332 F.Supp. 655 (S.D. Ind., 1971), State Defendants Appendix p. A-118, (hereafter App. p. ——), *aff'd.* 474 F.2d 81 (7th Cir., 1973) (App. p. A-102), *cert. denied* 413 U.S. 920 (1973); 368 F.Supp. 1191 (S.D. Ind., 1973), (App. p. A-33), *aff'd.* 503 F.2d 68 (7th Cir., 1974), (App. p. A-1), *cert. denied* 421 U.S. 929 (1975).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1) and Rule 19 (1) (b) of the Rules of this Court, to review an opinion of the Seventh Circuit which has decided a federal question in a way in conflict with applicable decisions of this Court.

The opinion of the Seventh Circuit was issued on July 16, 1976. This Petition is timely in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101(c).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Circuit erred in affirming the District Court's finding that the establishment of Uni-Gov boundaries without a like re-establishment of the boundaries of the Indianapolis Public Schools warrants an interdistrict remedy.

2. Whether the Seventh Circuit erred in affirming the District Court's finding "that the State of Indiana has promoted segregation and inhibited desegregation . . ." within the Indianapolis Public Schools.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions relied upon are the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. § 2000c-6(a) and I.C. 18-4-1-1 *et seq.*, the first of which are appended at App. pp. A-171 and A-172, with relevant sections of the latter appended at App. p. A-173 through A-177.

STATEMENT OF THE CASE

This Petition arises from an opinion issued by the Seventh Circuit on July 16, 1976, affirming, by a divided Court, a decision of the District Court in a school desegregation case which ordered an interdistrict remedy to correct segregation previously found to exist only in the Indianapolis Public School system (hereafter I.P.S.).

I.

Course of Proceedings Below

A.

"Indianapolis 1[3]"

The original Indianapolis lawsuit was commenced on May 31, 1968, when the United States of America filed a Complaint in the District Court which was assigned cause number IP-68-C-225. The action by the United States was brought pursuant to 42 U.S.C. § 2000c-6(a) and (b), and was tried by the Court on July 12-21, 1971. Defendants in the aforementioned complaint were the Board of School Commissioners of the City of Indianapolis, its Superintendent of Schools, and members of its Board.

On August 18, 1971, the District Court issued its "Memorandum of Decision" holding that I.P.S. was guilty of *de jure* segregation. The District Court's findings in that trial were that the I.P.S. School Board constructed three high school buildings in 1961, 1963, and 1967, the placement of which constituted acts of *de jure* segregation within I.P.S.

The Court permanently enjoined the defendants, their successors in office, officers, agents, employees and all those in active concert or participation with them from "discriminating on the basis of race in the operation of the Indianapolis School System," and further ordered the defendants to take seven steps to "fulfill their affirmative duty to achieve a nondiscriminatory school system." 332 F.Supp. at 680. In that regard the Court instructed the

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[3]The District Court has characterized its various decisions in this matter as follows: Indianapolis I is 332 F. Supp. 655 (S.D. Ind., 1971); Indianapolis II is 368 F. Supp. 1191 (S.D. Ind., 1973); Indianapolis III is 368 F. Supp. 1223 (S.D. Ind., 1973); Indianapolis IV is the opinion of August 1, 1975, which is unreported at this time.

Plaintiff to bring in additional parties to seek "such relief as to the plaintiff seems justified," 332 F.Supp. at 680, including the possibility of the creation of a metropolitan school district for the area of I.P.S. and the surrounding school districts.

In that opinion the District Court speculated that a desegregation plan within I.P.S. only might not "work" because of the possibility of an "exodus" of white families from that school district.

The Petitioners herein were never parties to that proceeding in any manner. They did not present any evidence or examine any witnesses. They did not receive any notice of the proceedings and did not participate in the appeal thereof.

On September 7, 1971, pursuant to the order of the District Court, the United States filed a "Motion to Add Parties Defendant" and an order was entered on the same date which made twelve (12) school corporations defendants in the previously concluded case. However, the United States requested no relief against any of those twelve (12) school corporations, and no relief has since been demanded by the United States against those schools or any other added defendant.

On September 10, 1971, the original defendants filed their Notice of Appeal to the Seventh Circuit from the final judgment entered on August 18, 1971. The District Court's opinion was affirmed, 474 F.2d 81 (7th Cir., 1973). *Cert. denied* 407 U.S. 920 (1973).

B.

"Indianapolis II"

On September 14, 1971, a "Motion to Intervene as Party Plaintiff" was filed by Donny Brurell Buckley and Alycia

Marquese Buckley who purported to intervene as representatives of a class comprised of Negro school age children in Marion County, Indiana. A "Complaint in Intervention" was filed with the motion, using the same cause number as the previously concluded case. That Complaint named the Board of School Commissioners of the City of Indianapolis, *et al.*, as defendants, and named the Superintendent of Public Instruction of the State of Indiana and nineteen school districts as added defendants. The "Complaint in Intervention" was brought pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343 (3) and the Fourteenth Amendment to the Constitution of the United States.

On October 21, 1971, an Amended Complaint was filed by intervening plaintiffs which named the Governor, the Attorney General, and the Indiana State Board of Education, a public corporate body, as added defendants. That complaint sought relief pursuant to 42 U.S.C. §§ 1983 and 1988, 28 U.S.C. §§ 1343 (3), 2201 and 2202, and the Fourteenth Amendment to the Constitution of the United States.

The Petitioners herein and the other added defendants filed motions with the District Court asking, in the new trial involving them, that they not be bound by the findings and evidence of the preceding trial and judgment.

In its Entry of December 30, 1971, the District Court denied those motions, but held that the Defendants could contest the issues raised in the first trial.

In its Entry of February 2, 1973, the District Court set a trial date and stated:

> ". . . The Trial will be limited to the issues formed on the amended complaint of the intervening plaintiffs . . . and the answers thereto."

In a "Pre-trial Conference" the day before the commencement of the trial in the new action, the District Court reversed itself and held that its findings in the first trial were *res judicata* in the second trial; hence the findings against I.P.S. stood as before.

Trial of the new action occurred before the District Court on June 12, 1973 through July 6, 1973, and those proceedings were reopened by the Court on its own motion on July 18, 1973. In that trial the parties were I.P.S.; ten (10) school systems located in Marion County, Indiana[4]; ten (10) school systems located outside of Marion County, Indiana[5]; and the State Defendants.

Two days after the District Court reopened the proceedings and took evidence, it issued its "Memorandum of Decision." In that Decision the Court refound the acts of *de jure* segregation on the part of I.P.S., and held that those acts were "imputed" to the Indiana State Board of Education and the State Superintendent of Public Instruction. The Court entered orders against all but one of the added Defendant school districts even though it *found* that there were no acts on *de jure* segregation attributable to any of the added defendant school districts. 368 F.Supp. at 1208-1210. *That finding has never been contested by any party in these entire proceedings.*

The District Court did enter findings against the Indiana State Board of Education and the Superintendent of Public Instruction. Those findings were that the findings against I.P.S. in the first trial, i.e., that the placement of three high school buildings constituted acts of *de jure* segrega-

[4]Those ten school systems include eight township schools and two schools serving a town and city located within Marion County, Indiana. Their combined enrollment in 1972-73 was approximately 77,611 children.

[5]Those ten schools were located in six Indiana counties surrounding Marion County, Indiana in which I.P.S. is located.

tion, were "imputed" to the State Defendants. No other specific findings were entered against any state officials.

The District Court stated that it could desegregate I.P.S. within its own boundaries:

> "In other words, it is apparent that as a sheer exercise in mathematics, it would be possible for this Court to order desegregation of I.P.S. on a 58.9%-41.1% basis, or some similar thereto, so that no school could, for the time being, be racially identifiable as a black school . . ." 368 F.Supp. at 1198.

However, the Court then stated that the desegregation of I.P.S. could not be permanently accomplished within its own boundaries, primarily because of the possibility of resegregation "within a matter of two or three years." 368 F.Supp. at 1198.

Therefore, contrary to *Green v. County School Board of New Kent County, Virginia,* 391 U.S. 430 (1968), *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), and *Pasadena City Board of Education v. Spangler,* 96 S. Ct. 2697 (1976), the District Court was not looking for a plan that promised realistically to work *now,* but one that promised to work, it believed, for all time. Compare *Swann, supra,* at pages 31 and 32.

There was nothing in the Buckley complaint which in any way raised the question of the adequacy of an "Indianapolis only plan". The United States has never stated a claim for relief against the added defendants for any alleged segregatory acts. In fact, in oral argument, the United States stated: "Upon the evidence that has been presented, we are unable to discern the existence of such violations". (T. 1973, p. 2818). Further, concerning the "state defendants", the position of the United States was,

"we have seen no evidence of segregatory acts perpetuated by the state defendants." (T. 1973, p. 2819).

The issue of the feasibility of an Indianapolis only plan was put in the case by the District Court as it stated expressly during the presentation of the defendants' case in the 1973 trial:

> "[T] purpose of this hearing is to concern itself with the method by which desegregation of the de jure segregated Indianapolis Public School City . . . shall be accomplished within the confines of the school city, or shall be a larger geographical area be considered [sic] . . ." (T. 1509-1510)

But the Court did not deny that a desegregation plan within I.P.S.—which had a ratio of sixty (60) per cent white and forty (40) per cent black—could be accomplished. Rather, the Court wanted to effect a desegregation plan for I.P.S. which, in terms of racial balance, would always be "stable". Compare *Pasadena City Board of Education v. Spangler, supra.* The gist of the Court's concept of desegregation was not a workable plan now, but a plan which once done would forever function in the particular way it was first decreed:

> "In my opinion of 1971, I suggested it might be more practical to put more emphasis on the word 'work' than on the word 'now'—which is why we are all here, I suppose. So . . . I am interested in finding out . . . whether or not it is practical, feasible, and workable to desegregate the Indianapolis School System within its own boundaries. I don't mean . . . 'Is It Mathematically Possible to Do It?'" *There is no use to take up all this time and all of this expense trying to determine if it is theoretically possible to desegregate a school system which has 60 per cent white and 40 per cent black.*

> *Obviously . . . it is mathematically possible. Any first grade student of mathematics knows that.*" (Emphasis supplied) (T.1973, pp. 1512-1513.)

In the entire record there is not a single piece of evidence which disputed the court's conclusion that a workable plan can now be effected in I.P.S. It was not disputed by any party in the trial, including the intervening plaintiffs and the United States.

Notices of appeal to the Seventh Circuit were filed by the original defendants and all added defendants by August 16, 1973, and on September 18, 1973, the United States filed its notice of appeal. The Seventh Circuit heard oral argument on February 20, 1974, and issued its decision on August 21, 1974, affirming the District Court in part, and holding that:

> ". . . the state officials have, by various acts and omissions, promoted segregation and inhibited desegregation within IPS, so that the state, as the agency ultimately charged under Indiana law with the operation of the public schools, has an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries (see Part IV hereof.)"

The Seventh Circuit also held that the addition of the added defendants to the second lawsuit (after the Indianapolis I case was already on appeal), and binding those added defendants to the findings of Indianapolis I, was not a denial of due process.

Further, the Seventh Circuit reversed the District Court's rulings relating to a metropolitan remedy beyond Marion County, Indiana, and remanded the case to the District Court for further proceedings regarding a multi-district remedy within Marion County, Indiana. Certiorari was denied on April 21, 1975. 95 S. Ct. 1654 (1975).

In its opinion the Seventh Circuit pointed out that the District Court had found that the added defendant school corporations were not guilty of any segregatory or discriminatory acts. On the basis of *Milliken v. Bradley*, 418 U.S. 717 (1974), the Court held that the added defendant school corporations "beyond the Uni-Gov boundaries" were not subject to the inter-district remedies imposed upon them by the District Court. The Seventh Circuit interpreted *Milliken* as follows:

> "The Supreme Court further concluded that, even if state agencies participated in the maintenance of the Detroit system, as the lower courts had held, it did not follow that an inter-district remedy would be constitutionally justified or required." 503 F.2d at 79, 80.

After discussing various questions which had been raised on appeal, the opinion of the Seventh Circuit concluded:

> ". . . In accordance with Milliken v. Bradley . . . we reverse the district court's findings, conclusions, orders and rulings insofar as they pertain to a metropolitan remedy beyond the Uni-Gov boundaries; insofar as they pertain to a remedy within the boundaries of Uni-Gov, we vacate those rulings and remand for further proceedings consistent with that decision. The district court should determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with Milliken." Id. at 86.

Finally, the Court specifically instructed the District Court to disregard so-called "white flight" and to cease utilizing "white flight" considerations to delay complete desegregation within I.P.S. The District Court was directed

to promptly formulate a decree which would eliminate desegregation existing within I.P.S. Id. at 80 and 86.

C.

"Indianapolis IV"

The Seventh Circuit remanded the case to the District Court specifically to determine whether a change in the civil boundaries of the City of Indianapolis without a corresponding change in the boundaries of the School City of Indianapolis warranted an interdistrict remedy.

However, in a Pre-Trial Entry dated December 13, 1974, following a Pre-Trial Conference on December 2, 1974, the District Court stated *inter alia,* that:

> ". . . the remaining issues appeared to be, at a minimum, the following: (a) The effect, if any, of the passage of the "Uni-Gov" Act in perpetuating de jure segregation within the boundaries of IPS, and (b), the effect, if any, of housing and zoning laws, rules, regulations, and customs in Marion County, Indiana, and its various political subdivisions upon the de jure segregation of IPS.

On March 18, 19, 20, and 24, 1975, the District Court held the trial which had been ordered by the Seventh Circuit and issued its "Memorandum of Decision" and "Judgment" on August 1, 1975. In that decision the District Court made a number of generalized and sweepingly conclusory statements without citation to any subsidiary facts or record evidence to support them.

Those statements related to public housing as developed by the Housing Authority of the City of Indianapolis and that because of the location of certain housing projects in IPS the State of Indiana "tended to cause and to perpetuate the segregation of black pupils in IPS territory."

The District court concluded that because of the location of a few public housing projects within IPS, segregation within IPS was continued. But there was no finding that the housing projects found in the territory of I.P.S. caused interdistrict segregation, or caused racial segregation in the additional Marion County School systems. There could not have been such a finding because there was no evidence to support it, and it would have been contrary to massive evidence introduced at trial.

The same kind of treatment was given to "Uni-Gov". The District Court found that Uni-Gov "inhibited desegregation with IPS". There was never a finding that Uni-Gov *caused* inter-district segregation, or prevented black students from attending other Marion County Schools.

In this entire litigation, there is not one specific instance in the record in which any member of the class was excluded from any Marion County school system, other than I.P.S., because of his race. Likewise, there is no one present for whom specific injunctive relief could be granted.

II.

Facts Material to Questions Presented

A.

Indianapolis Public School System

The I.P.S. system is one of eleven (11) separate and independent school districts in Marion County, Indiana. In 1972-73 its enrollment was 97,833 students which made it the largest school district in Indiana and the 29th largest district in the United States. The racial composition at that time was 60% white and 40% black.

B.

The Default Question

In its Entry of August 27, 1973, the District Court held that the I.P.S. Board of School Commissioners was in default in its obligation to develop adequate desegregation plans for the schools in its district. The Seventh Circuit concluded in its opinion of August 21, 1974, that the District Court acted properly in holding the I.P.S. board in default. Under *Swann v. Charlotte-Mecklenburg Board of Education, supra,* there was no obligation on the part of any State official or agency to come forward with a desegregation plan until the time that I.P.S. was declared to be in default or refused proceed. Thus, the State Defendants had no obligation or authority to desegregate I.P.S. at the time they were sued in 1971.

C.

Uni-Gov Statute

In 1969 several of the functions of the civil governments of the City of Indianapolis, Indiana and of Marion County, Indiana were consolidated into a unified government by the "Uni-Gov Act," I.C., 18-4-1-1, *et seq.* However, several functions were not consolidated, including the functions of police and fire protection. I.C., 18-4-12-6 and 7, and I.C., 18-4-12-35. In addition, the following governmental functions were not consolidated: airport authority and board; health and hospital corporation and board; county department of welfare and board; county home board; building authority, board of trustees and board of directors; capital improvements board of managers; housing authority; library districts and boards; and school corporations. See I.C., 18-4-3-14.

The public school systems in Marion County, Indiana have never been a part of the civil government, and were thus omitted from the Uni-Gov statute.

D.

Movement of Students Within Marion County Schools

The undisputed evidence contained in the entire record of this case shows that blacks moved into the Marion County school systems of their choice at a greater rate in number than whites. From the 1968 school year to May 7, 1973, the net increase in black students attending school corporations in Marion County, Indiana, other than I.P.S., was 1,141 or 93.5%, while the net increase in white students attending those same schools was 5,070 or 7.31% (Tr. Exh. Lawrence Q and S). More telling is the fact that the net increase in black students attending those same schools from the 1971 school year (the year of the District Court's first decision in this case) to May 7, 1973, was 261 or 12.43% while in the same period there was a net *decrease* in white students attending those same schools of minus 97 or minus 1.3%.

State Defendants' Exhibit A introduced in the last trial shows that for the three year period from 1971-72 to 1974-75, Marion County schools, excluding I.P.S., had a *decrease* in white student enrollment of 1,829 pupils, or a decrease of 2.52%. During that same period of time the black student population increased 993 pupils, or 32.10%. Other groups of students such as Indians and Spanish surnamed students increased 157, or 23.43%.

REASONS FOR ALLOWANCE OF THE WRIT

I.

AN INTERDISTRICT REMEDY IS NOT JUSTIFIED IN THIS CASE BASED UPON ALLEGED ACTION BY THE STATE DEFENDANTS

A.

THE SEVENTH CIRCUIT ERRED IN AFFIRMING AN INTERDISTRICT REMEDY ON THE BASIS OF THE CONSOLIDATION OF SOME OF THE MUNICIPAL GOVERNMENTAL FUNCTIONS OF THE CITY AND COUNTY.

In *Swann, supra,* this Court clearly established the power of a district court in a school desegregation case, stating at page 16:

> "In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that *judicial powers may be exercised only on the basis of a constitutional violation* . . .
>
> . . . As with any equity case, the nature of the violation determines the scope of the remedy . . . ."

This Court emphatically reaffirmed that principle in *Milliken v. Bradley, supra,* stating at page 744:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation . . . *Before the boundaries of separate and autonomous school districts may be set aside* by consolidating the separate units for remedial purposes or *by imposing a crossdistrict remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segre-*

> *gative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation . . .*"

In the first trial of this cause the District Court found that I.P.S. was guilty of *de jure* segregation. The District Court reaffirmed that finding in the second trial, but expressly stated that none of the other separate and independent school districts involved therein were guilty of any *de jure* segregation. 368 F.Supp. at 1203. Thus, there was a violation in one school district, but no interdistrict violations.

That finding of no *de jure* segregation has never been challenged on appeal, and is the controlling finding in this case.

As this Court stated in *Milliken*, there must be a constitutional violation in one district "that produces a significant segregative effect in another district." 418 U.S. at 744. No such violation is present in this case. In fact, no interdistrict violations of any kind have ever been shown in this cause by either the original plaintiffs or the intervening plaintiffs (hereafter Buckleys).

This litigation has been continuing since 1968, and throughout this period of time neither the United States nor the Buckleys have ever produced one witness who has testified either that he or she has been prohibited from attending school in the district in which they reside due to their race or that they were required to attend a particular school due to their race.

The majority opinion of the Seventh Circuit clearly shows that the finding of no *de jure* segregation is the most important finding in this case even though the major-

ity chose to ignore that finding. On page 15 of the slip opinion (Perry App. A16) the Court quoted *Milliken* and emphasized the following:

> "... Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation . . . ."

Further, on page 16 (Perry App. A17) the Court quoted this Court in *Hills v. Gautreaux,* 96 S.Ct. 1538, 1545 (1976) as follows:

> " . . . The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but *because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation.*" (Emphasis supplied.)

A section of the *Gautreaux* case not cited by the Seventh Circuit but of extreme importance in this case is the following sentence at page 1546:

> " . . . The critical distinction between HUD and the suburban school districts in *Milliken* is that HUD has been found to have violated the Constitution."

In *Milliken,* of course, there were no findings of any kind against the school corporations. However, in this case the suburban school districts have been found *not* to have violated the Constitution, but an interdistrict remedy has, nevertheless, been visited upon them.

In its opinion affirming that interdistrict remedy the Seventh Circuit stated:

> "Because, in 1969, 95 percent of the blacks in Marion County lived in the inner city and segregation in its schools was under attack in federal court, it is clear to us that Uni-Gov and its companion 1969 legislation were '[A] substantial cause of interdistrict segregation.' *Milliken v. Bradley,* 418 U.S. 717, 745 (1974), and '[C]ontributed to the separation of the races by . . . redrawing school district lines . . .' *Id.* at 755 (Stewart, J., concurring)." Perry App. A19.

This statement is factually incorrect for at least three reasons. First, segregation was not under attack in Marion County schools, only in the I.P.S. district. Second, neither the Seventh Circuit nor the District Court has ever found "interdistrict segregation," in the schools in Marion County. Third, school district lines were not redrawn.

The Seventh Circuit recognized that "Uni-Gov was a neutral piece of legislation on its face with its main purpose to efficiently restructure civil government within Marion County," Perry App. A17, 18, but stated that the Indiana General Assembly should have considered "the *needs* of the school system [I.P.S.] in the Uni-Gov legislation." Perry App. A19. (Emphasis supplied.)

Thus, a constitutional violation was not required by the Seventh Circuit.

In *Washington v. Davis,* 96 S.Ct. 2040 (1976) this Court stated at page 2048:

> ". . . The challengers did not prevail because they failed to prove that the New York legislature 'was either motivated by racial considerations or in fact drew the districts on racial lines'; the plaintiffs had not shown that the statute 'was the product of a state contrivance to segregate on the basis of race or place of origin.'" 376 U.S., at 56, 58 . . .

> The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of *de jure* segregation is 'a current condition of segregation resulting from intentional state action . . . the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate.' *Keyes v. School District No. 1,* 413 U.S. 189, 205, 208 . . . See also *id.*, at 199, 211, 213, . . .
>
> . . . A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. *Yick Wo v. Hopkins,* 118 U.S. 356; 6 S.Ct. 1064, 30 L.Ed. 220 (1886) . . . ."

By holding Uni-Gov somehow responsible for the segregation found to exist in I.P.S., the courts below are actually saying that a statute that took effect in 1970 caused segregation that the District Court found to exist in this case on the:

> ". . . two critical dates . . . May 17, 1954, the date of the decision of the Supreme Court of the United States in *Brown v. Board of Education of Topeka* ("Brown I") 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 38 A.L.R. 2d 1180, and May 31, 1968, the date on which this suit was filed." 332 F.Supp. at 657-658.

Such a result is untenable and cannot be allowed to stand.

B.

THE ALLEGED HOUSING VIOLATIONS DO NOT JUSTIFY AN INTERDISTRICT REMEDY IN A SCHOOL DESEGREGATION CASE.

Just as there is no basis for an interdistrict remedy arising from the enactment of Uni-Gov, there is also no justification for an interdistrict remedy based upon alleged housing violations. It should be re-emphasized that this is a school desegregation case with a finding of *de jure* segregation in one school district only, and no finding of any interdistrict violations.

The majority opinion of the Seventh Circuit "held" that the location of housing projects "within I.P.S. and in many cases *near* all black neighborhoods . . . significantly contributed to the disparity in residential and school populations between the inner city and the suburbs." Perry App. A24. (Emphasis supplied.)

However, as the dissent correctly observed:

> The District Court, while unconvinced by the reasons given for the selection by the Housing Authority of certain sites near the periphery of the City of Indianapolis, made no findings that any of the Housing Authority's decisions were racially motivated. As the majority notes, under federal statute (42 U.S.C. § 1415 (7) (b)(i) and HUD guidelines, the Housing Authority could not obtain federal funds for a project in the absence of a cooperation agreement with the local governmental authority obligating the latter to provide essential governmental services; and as the District Court found, 'Suburban Marion County officials have refused to cooperate with HUD on the location of such projects.' *It is apparent from the record and the District Court's findings that this was the real reason housing projects were built only within the City of Indianapolis before the effective date of Uni-Gov.*

> *There was no finding and no evidence that the refusals were racially motivated. Failure of local authorities to enter into these agreements, without more, does not give rise to an inference of racially discriminatory purpose, even though the projects are to be occupied by large numbers of blacks.* See *James v. Valtierra, supra,* 402 U.S. at 141; see also *Metropolitan Housing Development Corp. v. Village of Arlington Heights,* 517 F.2d 409, 412-413 (7th Cir. 1975), *cert. granted,* 96 S.Ct. 560 (1975). As these cases hold, the State's location of low-rent housing projects for racially neutral reasons, even though it has a disparate effect on minority groups, is not subject to strict scrutiny. *James v. Valtierra, supra,* 402 U.S. at 141; *Metropolitan Housing Development Corp. v. Village of Arlington Heights, supra,* 517 F.2d at 413 . . ." (Emphasis supplied.) Perry App. A33.

Thus, the State Defendants would submit that the location of public housing projects has not resulted in any interdistrict constitutional segregatory violations that would give rise to an interdistrict remedy.

C.

YEARLY ALTERATION OF A DESEGREGATION REMEDY IS CONTRARY TO THE DECISIONS OF THIS COURT.

In the majority opinion the Seventh Circuit stated:

> "In affirming the district court's order, we suggest that the court monitor the transferance of black pupils from IPS to the other school districts periodically, perhaps on a yearly basis, in order that modifications, if necessary, may be made. This is in the hope that segregation and discrimination will be completely eradicated within IPS in furtherance of the goal of equal opportunity proclaimed two hundred years ago in the Declaration of Independence."
> Perry App. A.26.

This "suggestion" completely violates *Swann v. Charlotte-Mecklenburg Board of Education, supra,* and *Pasadena City Board of Education v. Spangler, supra,* and must be reversed by this Court.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and order of the Seventh Circuit.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Nos. 73-1968 through 73-1984
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

DONNY BRURELL BUCKLEY, et al.,
Intervening Plaintiffs-Appellees,

v.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 68-C-225

S. HUGH DILLIN
Judge.

ARGUED FEBRUARY 20, 1974 — DECIDED AUGUST 21, 1974

Before SWYGERT, *Chief Judge,* KILEY, *Senior Circuit Judge,* and SPRECHER, *Circuit Judge.*

SPRECHER, *Circuit Judge.* This is a school desegregation case originally brought by the United States against the Board of School Commissioners of Indianapolis, Indiana, but later expanded to include as defendants school districts located in the surrounding metropolitan area. These 17 separate appeals raise a host of divergent issues.

I

THE BACKGROUND

The United States initiated this action on May 31, 1968, pursuant to section 407(a) and (b) of Title IV of the Civil

Rights Act of 1964 (42 U.S.C. § 2000c-6(a) and (b)). The complaint charged the Board of School Commissioners for the City of Indianapolis with racial discrimination in the assignment of faculty and students.

The faculty portion of the charge was resolved first. On August 5, 1968, the district court concluded (pursuant to stipulation by the parties that racial factors had been considered in the assignment of teachers and staff members) that racial composition of faculty and staff deprived students of equal protection in violation of the Fourteenth Amendment. The court entered a consent decree ordering remedial injunctive relief commencing with the school year of 1968-69. Faculty and staff desegregation is one "important aspect of the basic task of achieving a public school system wholly free from racial discrimination." *United States v. Montgomery County Board of Education*, 395 U.S. 225, 232 (1969).

Public school teachers in Indianapolis then brought a class action in an Indiana state court and obtained a temporary restraining order to prevent transfers of teachers and staff without the consent of the teachers involved. Defendant school board and its members removed the case to the federal district court, which promptly dissolved the restraining order. *Burns v. Board of School Commissioners*, 302 F. Supp. 309 (S.D. Ind. 1969), *aff'd*, 437 F.2d 1143 (7th Cir. 1971).

The student portion of the 1968 case was tried before the court on July 12-21, 1971. In accordance with *Brown v. Board of Education (Brown I)*, 347 U.S. 483 (1954), the court found that the Indianapolis school board was deliberately operating a *de jure* dual school system on May 17, 1954 (the date of *Brown I*), and had not changed its policies in order to eliminate *de jure* segregation on

or before May 31, 1968 (the date of the government's complaint). Pursuant to *Brown v. Board of Education (Brown II)*, 349 U.S. 294 (1955), the court on August 18, 1971 ordered interim relief, retained jurisdiction to order further relief and directed the school board to file plans of affirmative action for the school year 1971-72 as required by *Green v. County School Board*, 391 U.S. 403, 437-38 (1968). ("School boards . . . were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.") *United States v. Board of School Commissioners (Indianapolis I)*, 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973).

In *Indianapolis I*, the court concluded that the common law of Indiana was that the boundaries of a school district and of a civil city were coterminous, a rule finally recognized by statute in 1931.[1] Statutes passed in 1961[2] and in 1969[3] provided that, if Indianapolis' boundaries were extended, those of its school district could likewise be expanded. Such expansion, however, would be subject to a separate remonstrance or veto by a specified percentage of persons affected.

In 1969, after this suit had been commenced, the civil governments of the City of Indianapolis and of Marion County were consolidated into a unified, metropolitan city government by the so-called Uni-Gov Act, which expressly

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[1] Acts 1931, Ch. 94, § 1, p. 291; Burns Ind. Stat. Ann. § 28-2301 (1948 Repl.), I.C. 1971, 20-3-11-1.

[2] Acts 1961, Ch. 186, §§ 1, 9, 10; Burns Ind. Stat. Ann. §§ 28-2338, 28-2346, 28-2347 (1968 Cum. Supp.), I.C. 1971, 20-3-14-1, 20-3-14-10.

[3] Acts 1969, Ch. 52, § 3, p. 57; Burns Ind. Stat. Ann. § 28-2346a (1970 Cum. Supp.), I.C. 1971, 20-3-14-9.

provides that the Indianapolis school district would not be affected by the expansion of the city.[4] In other words, the school district (or School City) of Indianapolis was confined to an area in the central part of the new Uni-Gov, where it is surrounded by eight township school systems and by two additional city school corporations (Beech Grove and Speedway City), all operating independently within the new unified City of Indianapolis and within Marion County.

The district court concluded that "the easy way out . . . would be to order a massive 'fruit basket' scrambling of students within the School City," but "it won't work." Resegregation would rapidly occur because of a white exodus from what would be substantially black schools. The resegregation problem "would pale into insignificance if the [school] Board's jurisdiction were coterminous with that of Uni-Gov" and "would be minimized still further if extended to . . . Beech Grove and Speedway City, and to certain parts of the adjoining counties practically indistinguishable from the City of Indianapolis. . . ." The court ordered the United States as plaintiff to join as additional parties defendant the municipal corporations and school corporations which would have an interest in the court's intended consideration of the entire metropolitan area. 332 F. Supp. at 678-80.

On September 7, 1971, the United States moved to add as parties defendant all school corporations in Marion County (eight townships and two city corporations). A few days later, the court permitted the Buckley plaintiffs (Donny Brurell Buckley and Alycia Marquese Buckley by their parents and next friend, Ruby L. Buckley) to inter-

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[4] Acts 1969, Ch. 173, § 314, p. 357; Burns Ind. Stat. Ann. § 48-9213 (1970 Cum. Supp.), I.C. 1971, 18-4-3-14.

vene in their own right and as representatives of a class consisting of "all Negro school age children residing in the area served by" the Indianapolis school board. The intervening plaintiffs, in turn, joined as additional parties defendant the Governor and Attorney General of Indiana, the state Superintendent of Public Instruction, the state Board of Education and 19 school corporations (including the ten within Marion County which had been joined by the United States, plus nine in the adjoining counties of Boone, Hamilton, Hancock, Johnson, Morgan and Hendricks).

Citizens of Indianapolis for Quality Schools, Inc., a not-for-profit corporation, was permitted to intervene as a defendant. *See United States v. Board of School Commissioners,* 466 F.2d 573 (7th Cir. 1972), *cert. denied,* 410 U.S. 909 (1973). Coalition for Integrated Education, an unincorporated association favoring a metropolitan plan of desegregation, was granted leave to file briefs as *amicus curiae* in both the district court and in this court.

The intervening plaintiffs filed an amended complaint in intervention in two counts. The first count alleged that the Indiana statutes effecting a governmental reorganization in Indianapolis were unconstitutional as racially discriminatory because schools were excluded from the consolidated metropolitan government, and prayed for an order consolidating the defendant school systems. The second count alleged and sought relief from racial discrimination by the state and local school authorities in the operation of the public schools of Indianapolis and the surrounding school corporations.

The additional defendants filed various motions attacking their joinder, the complaint in intervention and the court's jurisdiction on a variety of grounds. All these mo-

tions were overruled by the district court. Several of the added defendants subsequently applied unsuccessfully to this court for writs of prohibition or mandamus to vacate the joinder and intervention orders;[5] to compel the convening of a three-judge district court;[6] and to compel the recusation of the district judge.[7]

On September 28, 1972, the court for the first time ordered the development and submission of comprehensive plans for the desegregation of the Indianapolis district.[8] In response, the Indianapolis board on February 8, 1973 submitted a plan, denominated the "Stabilization Plan." The "Stabilization Plan" was subsequently rejected by the court on June 11, 1973.

The remedy phase *(Indianapolis II)* was tried before the court from June 12 to July 6 and July 18, 1973. On July 20, 1973, the court entered its decision, concluding that (1) desegregation promising a reasonable degree of permanence could not be accomplished within the present boundaries of the Indianapolis school district; (2) the State of Indiana, its officials and agencies, had by various acts

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[5] This court ruled on three such applications: *Avon Community School Corp.* v. *Dillin*, No. 71-1695 (Sept. 27, 1971); *Carmel-Clay Schools* v. *Dillin*, No. 71-1702 (Oct. 1, 1971); and *School Town of Speedway* v. *Dillin*, No. 72-1063 (Feb. 2, 1972), *cert. denied*, 407 U.S. 920 (1972).

[6] *Metropolitan School District* v. *Dillin*, No. 73-1101 (Apr. 2, 1973), *cert. denied*, 412 U.S. 953 (1973).

[7] *Sendak* v. *Dillin*, No. 73-1144 (Feb. 22, 1973), cert. denied, 412 U.S. 949 (1973); a motion for stay of a June 11, 1973 trial date pending the ruling on the petition for a writ of certiorari was denied by this court on May 23, 1973 and by the Supreme Court at 412 U.S. 937 (1973).

[8] A study of the school system, with iterim recommendations for desegregation, was prepared at the request of the board by a team of representatives from the Office of Education, Department of Health, Education and Welfare. Its recommendations were rejected by the board on June 17, 1969. *See United States* v. *Board of School Commissioners*, 332 F. Supp. 655, 670-71 (S.D. Ind. 1971). A federally funded study by two "advisory specialists" employed by the school board resulted in a series of desegregation recommendations which were also rejected shortly before trial in 1971. *See* 332 F. Supp. at 672.

and omissions promoted segregation and inhibited desegregation within the Indianapolis district, so that the state, as the agency ultimately charged under Indiana law with the operation of the public schools, has a continuing affirmative duty to desegregate the Indianapolis system; (3) the system could be effectively desegregated either by combining its territory with all or part of the territory served by the 19 surrounding school corporations in and adjacent to Marion County into a metropolitan system and then reassigning students within the expanded system or by transferring black students from the Indianapolis district to the 19 others, either on a one-way or exchange basis; and (4) the state, through its General Assembly, should first be afforded the opportunity to select its own plan; but if it failed to do so, the court would promulgate a plan. The court ordered interim relief in the form of student assignments for the 1973-74 school year sufficient to bring the number of black students in each Indianapolis elementary school up to approximately 15 percent, which was accomplished.[9] *United States v. Board of School Commissioners (Indianapolis II)*, 368 F. Supp. 1191 (S.D. Ind. 1973).

Meanwhile, the Indiana General Assembly was organized in November, 1973 for a session to begin in January, 1974. On December 6, 1973, the court issued a supplemental

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[9] On August 20, 1973, an additional hearing was conducted, after which the court ruled that a plan submitted by the Indianapolis board failed to comply with the iterim relief order and that circumstances justified the appointment, as officers of the court, of a two-man commission to accomplish the task. On August 30, 1973, a plan formulated by the commissioners was approved. Applications by the Indianapolis board for a stay of implementation of the orders entered on August 20 and 30 were denied by this court. Misc. No. 73-8170 (Sept. 10, 1973), and by a Justice of the Supreme Court, *Board of School Commissioners v. United States*, No. A-278 (Sept. 14 and Sept. 21, 1973) (Rehnquist, J.). The plan has now been implemented. The commissioners were discharged on December 10, 1973.

memorandum of decision, consisting principally of suggestions and recommendations for the General Assembly to implement *Indianapolis II* with an affirmative plan. *United States v. Board of School Commissioners (Indianapolis III)*, 368 F. Supp. 1223 (S.D. Ind. 1973).

The General Assembly held its scheduled session. The only legislation it passed relating to this case was Senate Enrolled Act No. 119, which was signed into law by the Governor of Indiana on February 20, 1974. The statute provides for the adjustment of tuition among transferor and transferee schools and for the reimbursement of transportation costs by the state and is rigidly limited in its application:

> This chapter applies solely in a situation where a court of the United States or of the State of Indiana in a suit to which the transferor or transferee corporation or corporations are parties has found the following: (a) a transferor corporation has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders; (b) a unitary school system within the meaning of such Amendment cannot be implemented within the boundaries of the transferor corporation; and (c) the Fourteenth Amendment compels the Court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such Amendment. This chapter shall not apply until all appeals from such order, whether taken by the transferor corporation, any transferee corporation or any party to the action, have been exhausted or the time for taking such appeals has expired, except where all stays of a transfer order pending appeal or further court action have been denied.

II

INTERIM RELIEF WITHIN THE INDIANAPOLIS PUBLC SCHOOL SYSTEM

In *Indianapolis II,* the district court directed the Indianapolis public school system (which the court referred to as IPS) to rearrange the enrollment patterns in its elementary schools, effective with the 1973-74 school year, so that each school would have a minimum black enrollment "in the area of 15%." IPS was directed to pair or cluster schools in close proximity and to realign school assignment zones in order to expand the neighborhood or community school concept and to reduce the necessity for busing. If, after utilizing these procedures, certain schools did not meet the required percentages of black enrollment, pairing or clustering of schools in noncontiguous zones would be required. 368 F. Supp. at 1209.

The unanimous Court in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 27 (1971), discussed these precise remedies and concluded that, even if paired or grouped zones for transferring blacks out of and whites into formerly segregated black schools were "on opposite ends of the city," nevertheless "[a]s an interim corrective measure, this cannot be said to be beyond the broad remedial powers of a court."

In response to *Indianapolis II,* IPS submitted a plan which proposed to close four predominantly black schools and to distribute the displaced students to white schools with excess unused capacity. After an evidentiary hearing on August 20, 1973 on the IPS plan, the district court found on August 27 that it (1) did not readjust the percentage of minority students in the elementary schools to approximately 15 percent; (2) did not provide for

reducing the percentage of minority students at Shortridge High School nor for increasing the percentage of minority students at Thomas Carr Howe High School, as previously ordered; and (3) did not provide for the use of any of the attendance zone, pairing or clustering devices required by the court. The court, concluding that "the Board is unable or unwilling to comply with the orders of this court," appointed a two-man commission to develop desegregation plans, temporarily assigned the IPS planning staff to assist the commissioners, and required that application be made for available federal funds to assist in desegregation.[10]

The Board of School Commissioners of IPS in the present appeal attacks the district court's order insofar as it (1) held the board in default; (2) appointed the two-man commission to prepare plans of desegregation; (3) assigned the professional planning staff of IPS to the temporary service of the commission; and (4) ordered IPS to apply for all available federal funds.

IPS alleges that the commission's plan for interim relief, which reassigned some 9,200 students as opposed to the IPS plan reassigning approximately 4,500 students, "in large part was copied from the earlier [IPS] plan." IPS Brief, p. 27.

We fail to perceive how desegregation and dismantlement of the IPS dual school system would be advanced by discarding the court's interim plan, which has been in effect for an entire school year, and by substituting

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[10] In an order entered on August 27, 1973, and expanded by an order denying stay entered December 18, 1973, the court ordered the Indianapolis board to apply "for Federal funds in all of the various categories available to school systems operating under orders of desegregation."

a similar plan that goes only half as far as the adopted plan in achieving desegregation.

"The measure of any desegregation plan is its effectiveness." *Davis v. Board of School Commissioners*, 402 U.S. 33, 37 (1971). "[A] school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25 (1971). "The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation." *Green v. County School Board*, 391 U.S. 430, 439 (1968).

Here the court's interim plan, although concededly only a temporary measure, was at least twice as effective as the rejected IPS plan.

The percentage of nonwhite enrollment in IPS grew from 18.9 percent in 1950 to 26 percent in 1960 and to 35.9 percent in 1970. At the time of trial, the percentage of black enrollment was 41.1 percent. The IPS interim plan affected 30 of the approximately 100 elementary schools and brought nonwhite enrollment to approximately 15 percent in each school. The commission (court-adopted) interim plan affected significantly 61 elementary schools and tended to bring both predominantly white and black schools closer to 41 percent black enrollment per school.

The 1972 enrollment, the IPS-planned enrollment for 1973 and the commission-planned enrollment for 1973 compare as follows (N.C. refers to "no change" and— indicates a discontinued school):

School	Percentage Non-White Enrollment 1972	IPS	Comm.	School	Percentage Non-White Enrollment 1972	IPS	Comm.
1	98.6	N.C.	N.C.	37	99.0	N.C.	34.9
2	23.7	N.C.	21.5	38	94.2	N.C.	35.0
3	0.7	14.5	27.5	39	4.2	15.1	20.1
4	99.5	—	39.8	40	—	—	—
5	47.7	N.C.	N.C.	41	99.6	N.C.	N.C.
6	—	—	—	42	100.0	N.C.	N.C.
7	38.8	N.C.	N.C.	43	99.8	N.C.	N.C.
8	1.7	N.C.	15.2	44	99.6	N.C.	N.C.
9	32.1	N.C.	—	45	98.4	N.C.	N.C.
10	—	—	—	46	8.9	15.0	24.7
11	40.7	N.C.	N.C.	47	0.0	15.0	24.8
12	30.7	N.C.	20.8	48	100.0	N.C.	N.C.
13	—	—	—	49	5.4	15.0	24.7
14	6.9	15.2	15.1	50	0.0	N.C.	31.0
15	0.6	N.C.	27.5	51	88.2	N.C.	39.9
16	11.8	16.1	—	52	77.2	N.C.	31.0
17	—	—	—	53	44.9	N.C.	N.C.
18	0.7	N.C.	19.2	54	0.0	N.C.	22.0
19	3.8	15.0	20.4	55	14.7	N.C.	N.C.
20	11.8	15.0	20.1	56	100.0	N.C.	N.C.
21	9.9	15.0	20.2	57	5.0	15.0	23.1
22	9.1	15.0	15.0	58	0.6	15.0	23.2
23	—	—	—	59	18.7	N.C.	N.C.
24	—	—	—	60	100.0	N.C.	N.C.
25	—	—	—	61	1.9	15.0	19.9
26	93.0	N.C.	38.0	62	1.6	N.C.	15.3
27	86.5	N.C.	N.C.	63	99.7	N.C.	N.C.
28	3.0	15.0	20.4	64	99.4	N.C.	37.9
29	100.0	—	—	65	4.2	N.C.	19.7
30	0.7	15.0	30.8	66	95.1	—	N.C.
31	0.0	N.C.	19.1	67	36.6	N.C.	31.6
32	94.1	—	—	68	0.3	N.C.	18.02
33	7.7	15.1	27.4	69	99.2	N.C.	38.0
34	0.6	14.9	19.6	70	41.0	N.C.	34.7
35	0.0	N.C.	19.2	71	96.7	N.C.	N.C.
36	100.0	N.C.	—	72	20.1	N.C.	N.C.

School	Percentage Non-White Enrollment 1972	IPS	Comm.	School	Percentage Non-White Enrollment 1972	IPS	Comm.
73	81.9	N.C.	84.72	94	0.6	15.0	25.7
74	23.2	N.C.	N.C.	95	1.7	N.C.	22.4
75	84.6	N.C.	N.C.	96	0.8	15.1	16.4
76	99.7	N.C.	N.C.	97	25.4	N.C.	N.C.
77	1.2	N.C.	23.0	98	0.2	14.5	19.8
78	0.0	15.0	22.1	99	39.7	N.C.	N.C.
79	0.4	15.0	20.0	100	4.4	15.1	15.1
80	13.0	N.C.	N.C.	101	36.2	N.C.	N.C.
81	2.5	N.C.	20.0	102	1.2	15.0	19.9
82	0.0	N.C.	20.2	103	3.3	N.C.	19.8
83	63.1	N.C.	N.C.	104	45.8	N.C.	22.4
84	6.8	15.0	15.2	105	0.4	15.0	19.8
85	12.7	N.C.	N.C.	106	24.0	N.C.	N.C.
86	53.2	N.C.	N.C.	107	6.1	15.1	21.5
87	100.0	N.C.	29.9	108	1.8	N.C.	17.7
88	0.5	N.C.	15.8	109	0.9	N.C.	19.8
89	3.7	N.C.	18.89	110	99.2	N.C.	N.C.
90	8.0	15.1	15.0	111	37.3	N.C.	34.3
91	18.7	N.C.	N.C.	112	68.2	N.C.	38.0
92	4.0	N.C.	23.18	113	6.5	15.0	25.7
93	1.0	N.C.	25.7	114	52.5	N.C.	34.0

The district court properly rejected the IPS plan, which, two years after the finding of *de jure* segregation by IPS, went a relatively short distance toward desegregation. "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now.*" *Green v. County School Board, supra* at 439.

Faced with a totally unacceptable plan a few days before the beginning of the 1973-74 school term, the court turned to two independent commissioners to preform a herculean task within aminiscule period of time. The court said "in sorrow and with regret" that "never, since this thing

started on the complaint of the United States in 1968 . . . has any [IPS] Board . . . gone very far to do anything, really, unless they were pushed and ordered" and then "when they were ordered, they usually . . . come up with an alternative idea that doesn't go quite as far as the order, or you want a stay or something—anything to put it off.'"

In appointing the two commissioners to formulate a plan, the district court followed the procedure approved in *Swann v. Charlotte-Mecklenburg Board of Education, supra* at 16, 25:

> In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.
>
> • • •
>
> It was because of this total failure of the school board that the District Court was obliged to turn to other qualified sources, and Dr. Finger [a court-appointed expert] was designated to assist the District Court to do what the board should have done.

The commission adhered to the district court's guidelines as approved in *Swann* by altering attendance zones, by contiguous and non-contiguous pairing and clustering, by "ungerrymandering" and by creating larger "neighborhood schools." The commission presented its recommended plan, entitled "The Quest for Human Dignity" within ten days of its appointment. This could not have been accomplished without the temporary use of the IPS planning staff. If in fact the commission made use of planning staff material, it obviously made much more effective use of that material than IPS had done.

We conclude that the district court acted properly in rejecting the IPS plan, in holding the IPS board in default,

in appointing the commission and in temporarily assigning the planning staff of IPS to the commission.[11]

Finally, in regard to the IPS board's attacks on the district court's orders, we hold that the court did not abuse its discretion in ordering IPS to seek available federal funds to expedite desegregation. This method of implementation of a decree intended to eliminate a dual school system has been approved by several courts. *United States v. Texas*, 342 F. Supp. 24, 29 (E.D. Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972); *Whittenberg v. Greenville County School Dist.*, 298 F. Supp. 784, 790 (D. S.C. 1969) (three-judge panel). In *Plaquemines Parish School Board v. United States*, 415 F.2d 817, 833 (5th Cir. 1969), the court of appeals found a "broadly written" order requiring application for federal aid unjustified, but added:

> This direction is without prejudice to the right of the district court in the future in a specific situation as to specific funds to require that application be made when it is shown that the board has failed to apply for such funds as part of a plan or scheme to impede the end of the dual system of schools, or to discriminate against Negro children.

In the last analysis, we must look to *Swann*, where the Supreme Court said (402 U.S. at 28):

> The remedy for such [*de jure*] segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

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[11] *See Bradley* v. *Milliken*, 484 F.2d 215, 252 (6th Cir.), *vacated on other grounds*, ... U.S. . . . . (July 25, 1974): "[T]he defendants and school districts involved will continue to supply administrative and staff assistance to the [court-appointed] panel upon its request."

We believe that in this case the district court properly requested the defendants to seek federal funds.

III

RACIAL BALANCE WITHIN THE METROPOLITAN INDIANAPOLIS AREA

Even the Board of School Commissioners of IPS concedes that "it appears clear from the cases heretofore decided by the Supreme Court of the United States that the . . . obligation imposed by the Constitution of the United States upon IPS is the duty to dismantle the dual school system which was found to exist within its present boundaries." Brief, pp. 12-13.

The district court's opposition to a final desegregation plan within IPS was on the basis that "in the long haul, it won't work." 332 F. Supp. at 678. The court's theory was restated in *Indianapolis II* (368 F. Supp. at 1197):

> [T]he Court in its original opinion expressed some doubts as to whether or not a stable desegregation plan could be established within the confines of IPS, based upon the evidence adduced at that trial, which was all to the effect that when the percentage of Negro pupils in a given school approaches 40%, more or less, the exodus of white pupils from such school becomes accelerated and irreversible, resulting in resegregation. However, additional evidence on the issue was adduced at the recent trial, and the Court bases its findings exclusively upon such latter evidence.
>
> Having considered such evidence, the Court finds it to be a fact that when the percentage of Negro pupils in a given school approaches 25% to 30%, more or less, in the area served by IPS, the white exodus from such a school district becomes accelerated and continues. . . . All witnesses agreed that once a school becomes identifiably black, it never reverses to white,

> in the absence of redistricting. Therefore, progressions from white to black are irreversible once the critical percentage has been reached in the absence of intervention through redistricting. Below the critical percentage, however, schools tend to remain stable . . .

The district court then concluded that the most effective method of realistically accomplishing desegregation of IPS would be either by combining IPS territory with that of all or part of the territory served by the ten Marion County (Uni-Gov) school districts and possibly also with that of some or all of the nine school districts in counties adjacent to Marion County, and then reassigning students within the metropolitan area thus created, or by transferring black students from IPS to the other districts, either on a one-way or an exchange basis.

Having found IPS guilty of *de jure* segregation, the court then proceeded to consider upon evidentiary hearing the situation in the remaining school districts. He concluded (368 F. Supp. at 1203):

> There was no evidence that any of the added defendant school corporations have committed acts of de jure segregation directed against Negro students living within their respective borders. In fact, the evidence shows that, with a few exceptions, none of the added defendants have had the opportunity to commit such overt acts because the Negro population residing within the borders of such defendants ranges from slight to none. . . .

In *Milliken v. Bradley*, . . . US. . . . (July 25, 1974), where the lower courts had found a *de jure* segregated public school system in operation in Detroit *(Bradley v.*

Milliken, 338 F. Supp. 582, 594 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215, 258 (6th Cir. 1973)), but with "no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect," the majority of the Supreme Court said:

> To approve the remedy ordered by the court would impose on the outlying districts, not to have committed any constitutional violation, a wholly impermissible remedy....
>
> • • •
>
> Disparate treatment of White and Negro students occurred within the Detroit school system, and not elsewhere, and on the record the remedy must be limited to that system.

The Supreme Court further concluded that, even if state agencies participated in the maintenance of the Detroit system, as the lower courts had held, it did not follow that an interdistrict remedy would be constitutionally justified or required.

In the present case, based upon the district court's comprehensive and detailed recital of the history of Indiana law and procedure pertaining to Indiana schools, appearing in 332 F. Supp. at 658-77 and in 368 F. Supp. at 1199-1205, we conclude, as the district court did, that the state officials have, by various acts and omissions, promoted segregation and inhibited desegregation within IPS, so that the state, as the agency ultimately charged under Indiana law with the operation of the public schools, has an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries (see Part IV hereof).

On the other hand, the district court's findings, rulings, orders and discussion relating to a metropolitan remedy beyond the Uni-Gov boundaries are reversed. Those relat-

ing to a metropolitan remedy within Uni-Gov are vacated and remanded (see last section of this opinion).

IV

DISMANTLING THE DUAL SYSTEM WITHIN THE INDIANAPOLIS PUBLIC SCHOOLS

So-called "white flight" is not an acceptable reason for failing to dismantle a dual school system. "[It cannot . . . be accepted as a reason for achieving anything less than complete uprooting of the dual school system." *United States v. Scotland Neck City Board of Education,* 407 U.S. 484, 491 (1970). *See also Monroe v. Board of Commissioners,* 391 U.S. 450, 459 (1968).

Where system-wide dualism has been found, as here, ". . . [the] School Board has the affirmative duty to desegregate the entire system 'root and branch,'" and "the District Court must . . . decree all-out desegregation . . ." *Keyes v. School District No. 1,* 413 U.S. 189, 213, 214 (1973). We must guard against permitting the "white flight" considerations unduly to delay complete desegregation within IPS now that *Milliken v. Bradley* has disposed of the metropolitan remedy.

Subsequent to oral argument in these appeals, the record has been supplemented to include an order entered by the district court on July 3, 1974, whereby IPS has been directed to continue for the 1974-75 school year the interim plan in effect for the 1973-74 school year, except that feeder assignments to Thomas Carr Howe High School are to be arranged "to insure that the freshman class at such school for the coming school year will include a minority race enrollment of not less than 15%."

Obviously many steps have been taken to dismantle the IPS dual school system within its boundaries, but more steps must be taken. The Supreme Court's mandate to us to develop a plan of desegregation that "promises realistically to work *now*" *(Green v. County School Board,* 391 U.S. at 439), requires us to remand the case "for further proceedings consistent with [*Milliken v. Bradley*] leading to prompt formulation of a decree directed to eliminating the segregation found to exist" within IPS.

V

MISCELLANEOUS ISSUES ON APPEAL

Recusation of District Judge. The state officials (Governor, Attorney General, State Superintendent of Public Instruction and State Board of Education) moved to recuse the district judge by filing an affidavit of alleged personal bias or prejudice under 28 U.S.C. § 144. The affidavit stated that on December 27, 1972 the judge submitted to an interview which was published in six weekly newspapers and which allegedly evinced an attitude of prejudgment on the liability of the state officials.

The portion of the interview to which the state officials objected read as follows:

> The judge explained that he had involved the city's peripheral districts in the suit because the racial imbalance that is seen in the schools of the Indianapolis Public Schools system exists because of housing patterns in the city.

In *Indianapolis I,* which had been decided 16 months prior to the interview, the judge had found after hearing that "[l]ow-rent housing projects within the School City

have significantly affected the racial composition of the schools." 332 F. Supp. at 673.[12]

"The remarks were derived from proceedings had before the court, and not on attitudes or conceptions that were formed outside the courtroom, so as to constitute disqualifying personal bias or prejudice." *Hanger v. United States,* 398 F.2d 91, 101 (8th Cir. 1968), *cert. denied,* 393 U.S. 1119 (1969).

Furthermore, comments, rulings or questions propounded to witnesses by the judge during the subsequent trial in which the state officials participated as defendants, and views expressed concerning the applicable law during that trial, do not establish personal bias or prejudice. Nor did the state officials file any subsequent affidavit covering trial events.[13] We have examined the record and have found that the judge was necessarily firm at times, particularly when it appeared that the defendants were foot-dragging and stalling, but never did he exhibit personal bias or prejudice, nor go beyond the bounds of an ordinary and reasonable trier of fact attempting to solve a difficult and lengthy school desegration case.

Adding Parties-Defendant While Appeal Pending. The state officials argue that IPS appealed from *Indianapolis I* on September 10, 1971 and that everything that transpired in the district court between that date and February 1, 1973, when this court affirmed *Indianapolis I* (474 F.2d 81), is null and void. They point particularly to the addi-

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[12] *See also* 332 F. Supp. at 676: "[R]esegregation rapidly occurs, and the entire central core of the involved city develops into a virtually all-Negro city within a city when, as in Indianapolis, the Negro residential area is largely confined to a portion of the central city in the first place."

[13] 28 U.S.C. § 144 provides that "[a] party may file only one such affidavit in any case," but it also provides that the affidavit "*shall* state the facts and the reasons for the belief that bias or prejudice exists."

tion of state officials as parties-defendant on September 14, 1971, the filing of the amended complaint and complaint in intervention and the trial of *Indianapolis II*.

We disposed of this contention in an earlier appeal in this case, *United States v. Board of School Commissioners*, No. 72-1948 (Aug. 10, 1973), where we said (p. 3):[14]

> . . . Defendants also contend that all jurisdiction passed from the district court when the notice to appeal was filed.
>
> Certainly the district court had the power to enforce its earlier order while the appeal was pending. The Fifth Circuit addressed defendants' jurisdictional contention in *Plaquemines Parish Commission Council v. United States*, 416 F.2d 952, 954 (5th Cir. 1969):
>
> > "The district court did not lose jurisdiction of the parties merely because an appeal was pending from the desegregation order. Appellants cite no school case authority to support their view that the district court lacks jurisdiction to promulgate additional orders to maintain the status quo and to insure the enforcement of its previous orders. Generally, a district court retains jurisdiction to enforce its prior orders, and this is particularly true with respect to desegregation cases. United States v. Swift & Co., 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999 (1932); Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (Brown II); Green v. School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968)."

Eleventh Amendment. The state officials and one of the Marion County defendants, Perry Township, con-

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[14] The prior appeal was disposed of by an unpublished order, which under our Circuit Rule 28 "shall not be cited as precedent . . . except to support a claim of . . . law of the case." That is the reason for citing it here.

tended that the Eleventh Amendment[15] bars prosecution of an action "in essence against the State of Indiana[16] without the State's consent or waiver of consent."

In *Scheuer v. Rhodes*, —— U.S. ——, 42 U.S.L.W. 4543, 4545 (Apr. 17, 1974), Mr. Chief Justice Burger said for a unanimous court (Mr. Justice Douglas took no part):

> However, since *Ex parte Young*, 209 U.S. 123 (1907), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. *Ex parte Young* teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he
>
> > "comes into conflict with the superior authority of that Constitution and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. 209 U.S., at 159-160. (Emphasis supplied.)"

In *Cooper v. Aaron*, 358 U.S. 1, 4, 19-20 (1958), the Supreme Court said:

> As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim

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[15] The Eleventh Amendment to the Constitution of the United States provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens of any foreign State." The Eleventh Amendment applies to suits against a state by citizens of that state. *Fitts* v. *McGhee*, 172 U.S. 516 (1899).

[16] The amendment bars suits not only against the state when it is named a party but when it is the party in fact. *Edelman* v. *Jordan*, ... U.S. ...., 42 U.S.L.W. 4419 (Mar. 25, 1974).

> by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution. Specifically it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education*, 347 U.S. 483.
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> • • •
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> The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedom guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.

The Eleventh Amendment does not prevent enforcement of the Fourteenth Amendment, which commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

Res Judicata. Several of the school boards outside of IPS territory contend that they were deprived of due process of law by the district court's decision to make a portion of its prior holding in *Indianapolis I res judicata,* although these other school boards had not become parties to the litigation until after *Indianapolis I* had been decided.

On June 11, 1973, the court ruled that its previous judgment "to the effect that the School City of Indianapolis maintains a school system which is segregated by operation of law is *res judicata* . . ." In *Indianapolis II* the judge reiterated what part of *Indianapolis I* he considered binding on the parties. He said that the issue "that IPS was unlawfully segregating the public schools within its boundaries" was *res judicata.* This issue had been vigorously

fought by IPS in the district court and had been affirmed by this court after equally spirited opposition by IPS here. *United States v. Board of School Commissioners,* 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd,* 474 F.2d 81 (7th Cir.), *cert. denied,* 413 U.S. 920 (1973).

In *Indianapolis II,* the district court did "not consider its conclusions in [regard to metropolitan desegregation] as res judicata." 368 F. Supp. at 1195.

The outside school boards made no attempt to attack the issue of *de jure* segregation within IPS. In fact most of them, as well as the state officials, have argued in this appeal that IPS should be desegregated within its own boundaries.

In *Bradley v. Milliken,* 338 F. Supp. 582, 594 (E.D. Mich. 1971), the district court found a *de jure* segregated public school system in operation in the City of Detroit. The Court of Appeals for the Sixth Circuit, after noting that the 53 school districts outside of Detroit which the district court included in the desegregation area should be made parties and be given an opportunity to be heard, added that "the District Court will not be required to receive any additional evidence as to the matters contained in its Ruling . . . reported at 338 F. Supp. 582, or its Findings of Fact and Conclusions of Law on the 'Detroit-only plans of desegregation. . . ." 484 F.2d 215, 252, *reversed on other grounds, Milliken v. Bradley,* —— P.S. —— July 25, 1974).

This is precisely what the district court did in the Indianapolis case. We hold that its rulings in this regard were proper.

Three-Judge Court. The school boards outside IPS contend that the district court violated Indiana statutes by

purporting to order the transfer of school children from IPS to outside school districts without seeking to convene a three-judge court under 28 U.S.C. § 2281.

The district judge found that the Indiana statutes alleged to have been violated applied only to school corporations within Marion County, Indiana, and he therefore denied the motion for a three-judge court on the ground that the statutes were not of the requisite general, statewide application. *Griffin v. County School Board,* 377 U.S. 218, 227-28 (1964).

This court denied a petition by the school boards for a writ of mandamus or prohibition and aodpted the district court's memorandum of disposition of the three-judge question in *Metropolitan School District v. Dillin,* No. 73-1101 (Apr. 2, 1973), and certiorari was denied at 412 U.S. 953 (1973).

In the Detroit school case, the Sixth Circuit denied applications for writs of mandamus or prohibition against the district judge for "failing to convene three-judge courts . . . in spite of the fact that . . . [certain school] Districts were not parties to the desegregation proceedings and had not been found to have committed any act of de jure segregation." *Bradley v. Milliken,* 484 F.2d 215, 217-18 (6th Cir. 1973). The Supreme Court denied certiorari in the Detroit mandamus and prohibition cases at 410 U.S. 954 (1973).

Exclusion of Sociological Evidence. The outside school boards appealed the court's exclusion of the testimony of two expert sociological witnesses. Dr. David J. Armor would have testified that "mandatory busing programs could result in adverse sociological and psychological effects on the children involved . . . . that prejudice, racial

identity, solidarity and desire for separatism was usually enhanced rather than diminished, and that over the short run busing for purposes of integration did not lead to significant gains in student achievement or interracial harmony.'"[17] Dr. Earnest van den Haag would have testified: "(a) Contact between the races does not reduce prejudice; and (b) Integration (as distinguished from desegregation) may heighten racial identity and reduces the opportunity for actual contact between the races."[18]

In *Brown I, Brown v. Board of Education,* 347 U.S. 483 (1954), Mr. Chief Justice Warren buttressed his conclusion that the "separate but equal" doctrine of *Plessy v. Ferguson,* 163 U.S. 537 (1896), deprived minority children of equal educational opportunities, with a footnote citing some sociological and psychological authority to that effect. 347 U.S. at 494 n. 11. This reliance on supportive sociological material by the Supreme Court has led to a number of abortive attempts to overrule *Brown* and reinstate *Plessy* through reliance on sociological and psychological material which purports to show that minority children thrive when segregated. Needless to say, these attempts have all failed.

In *Mapp v. Board of Education,* the district court approved and implemented a plan of desegregation for the Chattanooga, Tennessee public schools at 329 F. Supp. 1374 (E.D. Tenn. 1971), and 341 F. Supp. 193 (1972). The majority opinion of a three-judge panel remanded the case to the district court for further consideration, particularly of recent sociological findings, in evaluating the impact of

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[17] *See also* Armor, "The Evidence on Busing," PUB. INTEREST 91 (Summer 1972).

[18] *See also* van den Haag, "Social Science Testimony in the Desegregation Cases," 6 VILL. L. REV. 69 (1960); van den Haag, "The Tortured Search for the Cause of Inequality," NAT. REV., Feb. 16, 1973, at 200.

induced busing upon educational achievement and race relations. Cause No. 71-2006 (6th Cir., Oct. 11, 1972). Judge Edwards dissented on the basis that any reevaluation of the sociological underpinnings of *Brown* was improper and misleading, and that counterevidence was available in any event.[19] Describing the majority's reference to Armor's article as "completely irrelevant to our legal problems," he appended to his dissent another article criticizing it. On December 14, 1972, the panel opinion was withdrawn and the case heard en banc. On April 30, 1973, the Sixth Circuit decided eight-to-two to affirm the district court in *Mapp v. Board of Education*, 477 F.2d 851 (6th Cir.), *cert. denied*, 414 U.S. 1022 (1973).

In *Northcross v. Board of Education*, 466 F.2d 890, 894 (6th Cir. 1972), the court said:

> . . . In short, the School Board argues, busing for the purposes of desegregation "is wrong."
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> The Supreme Court has, of course, come to the opposite conclusion in a recent unanimous decision, holding that "bus transportation" is one "tool of desegregation" which school authorities may be required to use. *Swann, supra*, 402 U.S. 1, 30, 91 S.Ct. 1267. Recognizing this to be the holding of *Swann*, Defendants nevertheless suggest that we come to a contrary conclusion on the basis of a single piece of much criticized sociological research, the conclusions of which are, by its own terms, inapplicable to the Southern school pattern. It would be presumptuous in the extreme for us to refuse to follow a Supreme Court decision on the basis of such meager evidence. *Swann* is controlling and requires us to sanction the use of bus transportation as a tool of desegregation when, as here, such busing is necessary to accomplish

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[19] Note, "Busing as a Judicial Remedy: A Socio-Legal Reappraisal," 6 IND. L. REV. 710, 736-38 (1973).

> the dismantling of the dual system and its use does not pose intolerable practical problems.

The "much criticized sociological research" is Armor's article cited *supra* in footnote 17[20] and criticized in Judge Edwards' dissent in the original *Mapp* decision.[21]

In *Stell v. Savannah-Chatham County Board of Education*, 220 F. Supp. 667, 673 (S.D. Ga. 1963), the district court as early as 1963 relied upon a great volume of sociological and psychological material, including the testimony of Dr. van den Haag, in refusing to dismantle a dual school system. The Court of Appeals for the Fifth Circuit promptly entered an injunction requiring desegregation pending appeal on the merits at 318 F.2d 425 (5th Cir. 1963) and reversed the district court at 333 F.2d 55 (5th Cir.), *cert denied*, 379 U.S. 933 (1964).

If this sort of sociological and psychological material were fully valid and if *Brown I* vitally depended upon it, even then only the Supreme Court itself could overrule *Brown*.

But, as we have seen, the validity of the material is in grave doubt and *Brown* is not dependent upon it. As Judge Sobeloff so aptly put it in *Brunson v. Board of Trustees*, 429 F.2d 820, 824, 826 (4th Cir. 1970) (Judge Sobeloff con-

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[20] "It was agreed among all parties and the court below that Dr. Armor would have testified at the trial to the facts and conclusions stated in such article . . . ." Brief for Carmel-Clay Schools, et al. in the present case at 42.

[21] Armor's article is also criticized in: Editorial, "Dangerous Orthodoxy," N.Y. Times, July 5, 1972, at 38, cols. 1-2; Farber, "Lawyers' Group Fears an Overreliance on Educational Studies," N.Y. Times, June 11, 1972, at 37, cols. 1-5; Hodgson, "Do Schools Make a Difference," ATLANTIC, Mar. 1973, at 40-41; Pettigrew, Useem, Normand, & Smith, "Busing: A Review of "The Evidence," PUB. INTEREST, Winter 1973, at 88; Pettigrew, Useem, Normand, & Smith, "Pierced Armor," INTEGRATED EDUC., Nov.-Dec. 1972, at 3; Reinhold, "Study Critical of Busing Scored," N.Y. Times, June 8, 1972, at 40, cols. 1-3; Strickman, "The Trouble with Armor," 6 URBAN REV., Sept.-Oct. 1972, at 20.

curring and responding to a dissent which relied in part upon the sociological theories of Dr. Thomas F. Pettigrew):

> . . . There have always been those who believed that segregation of the races in the schools was sound educational policy, but since *Brown* their reasoning has not been permitted to withstand the constitutional command.
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> • • •
>
> This idea, then, is no more than a resurrection of the axiom of black inferiority as justification for separation of the races, and no less than a return to the spirit of *Dred Scott*. The inventors and proponents of this theory grossly misapprehend the philosophical basis for desegregation. It is not founded upon the concept that white children are a precious resource which should be fairly apportioned. It is not, as Pettigrew suggests, because black children will be improved by association with their betters. Certainly it is hoped that under integration members of each race will benefit from unfettered contact with their peers. But school segregation is forbidden simply because its perpetuation is a living insult to the black children and immeasurably taints the education they receive. This is the precise lesson of *Brown*. Were a court to adopt the Pettigrew rationale it would do explicitly what compulsory segregation laws did implicitly.

The district court in *Indianapolis* was acting well within its discretion in excluding the testimony of Drs. Armor and van den Haag since neither the district court nor this court can overrule *Brown*.

Attorneys' Fees. The district court's decision in *Indianapolis II* included a finding that "attorneys for intervening plaintiffs and their class . . . are entitled to recover their reasonable attorneys fees and expenses, and intervening plaintiffs are entitled to recover their costs." 368 F. Supp. at 1210.

In *Norcross v. Board of Education*, 412 U.S. 427, 428 (1973), the Supreme Court held that under section 178 of Title VII of the Emergency School Aid Act, 20 U.S.C. § 1617, "the successful plaintiff [in a school desegregation case] 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'"

Section 718 did not become effective until July 1, 1972, whereas the intervening plaintiffs became parties to the case on September 14, 1971. However, in *Bradley v. School Board*, ... U.S. ..... (42 U.S.L.W. 4703, 4711, May 15, 1974), the Supreme Court held that "the District Court in its discretion may allow petitioners a reasonable attorneys' fee for services rendered" prior to July 1, 1972.

Section 718 provides in part that in a school desegregation case "the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

It is our understanding from the record that the district court has not awarded any specific fees to the intervening plaintiffs' attorneys; the court has the discretion to do so if the attorneys' services fall within the limitations set forth in section 718. Particularly, the court will be required to determine whether the intervening plaintiffs are "the prevailing party" under all the circumstances. We express no opinion on this issue inasmuch as the solution involves the intimate knowledge of this lengthy proceeding possessed only by the district court, whose discretion is called for by the statute.

In accordance with *Milliken v. Bradley*, ... U.S. ..... (July 25, 1974), we reverse the district court's findings,

conclusions, orders and rulings insofar as they pertain to a metropolitan remedy beyond the Uni-Gov boundaries; insofar as they pertain to a remedy within the boundaries of Uni-Gov, we vacate those rulings and remand for further proceedings consistent with that decision. The district court should determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries[22] warrants an inter-district remedy within Uni-Gov in accordance with *Milliken*.[23]

In all other respects, the findings, conclusions, orders and rulings of the district court are affirmed and the case is remanded for a prompt formulation of a decree directed to eliminating the segregation found to exist in IPS schools.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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[22] In *Milliken* v. *Bradley*, ... U.S. . . . (July 25, 1974), "The boundaries of the Detroit School District, . . . are coterminous with the boundaries of the city of Detroit, . . . established over a century ago by neutral legislation when the city was incorporated . . . ."

[23] "Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation. Thus an inter-district remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race." . . . . U.S. at . . . . *Cf.* Mr. Justice Stewart's concurring opinion: "Were it to be shown . . . that state officials had contributed to the separation of the races by drawing or redrawing school district lines . . . ; or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate."

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

DONNY BRURELL BUCKLEY, et al.,
Intervening Plaintiffs,

v.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al.,
Defendants.

No. IP 68-C-225

July 20, 1973.

As Corrected Nov. 12, 1973.

Supplemental Opinion Dec. 6, 1973.

MEMORANDUM OF DECISION

DILLIN, District Judge.

I.

Introduction

This is a school desegregation action originally brought by the United States on May 31, 1968, pursuant to Section 407(a) and (b) of the Civil Rights Act of 1964, 42 U.S.C.

§ 2000c-6(a) and (b) against The Board of School Commissioners of Indianapolis, Indiana (hereinafter IPS), the members of the Board, and its appointed Superintendent of Schools.

On August 18, 1971, this Court found and concluded that IPS was guilty of unlawfully segregating the public schools within its boundaries. That decision was unanimously affirmed by the United States Court of Appeals for the Seventh Circuit and review was denied by the Supreme Court of the United States, without dissent. United States v. Board of Sch. Com'rs, Indianapolis, Ind., D.C., 332 F.Supp. 655, aff'd 7 Cir., 474 F.2d 81, cert. den., 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041 (1973). Such issue is res judicata.

In contemplating a remedy to vindicate the rights of Negro school children, this Court concluded that it could have ordered a massive "fruit basket" scrambling of students within IPS to achieve exact racial balancing. But the Court also concluded that in the long run, given the steadily rising percentage of Negro pupils within IPS, the racial composition of IPS would become nearly all Negro because of an acceleration in the departure of white families with children from IPS. In this connection the Court discussed the "tipping-point" factor—the point at which white exodus from a school unit is accelerated by increase of Negro students beyond a certain variable percent, and noted that the tipping-point/resegregation problem would become insignificant if the boundaries of IPS were enlarged to include all of Marion County and a portion of its contiguous metropolitan region. The Court does not consider its conclusions in this area as res judicata.

In order to provide an appropriate adverse setting for further consideration of the legal and practical appropri-

ateness of a metropolitan plan, the Court ordered the plaintiff United States to secure the joinder of necessary parties and seek further relief to determine the answers to certain questions posed by the Court.

On September 7, 1971, the United States (hereinafter the Government), pursuant to such order, moved to add as parties defendant all school corporations in Marion County, other than IPS. The motion was granted. However, the Government failed to assert any claims or seek any relief against such added defendants. A few days later the Buckley plaintiffs filed their petition to intervene in this action in their own right and as representatives of a class consisting of Negro school age children residing in Marion County, Indiana, who are required to attend segregated schools operated by IPS. The petitioners alleged that their interests and those of the class they represented were not being adequately protected by the original plaintiff, the United States, because the Government had failed to seek relief against the added school defendants. The Court granted the petition to intervene on September 14, 1971.

The Buckley intervening plaintiffs (hereinafter plaintiffs) eventually joined as added defendants Edgar D. Whitcomb (since succeeded by Otis R. Bowen), as Governor of the State of Indiana; Theodore Sendak, as Attorney General of Indiana; John J. Loughlin (since succeeded by Harold H. Negley), as Superintendent of Public Instruction of the State of Indiana; The Indiana State Board of Education, and nineteen school corporations within and without Marion County, Indiana (including the ten in-county corporations joined by the Government), as follows:

Marion County

The Metropolitan School District of Decatur Township (hereinafter Decatur)

The Franklin Township Community School Corporation (hereinafter Franklin)

The Metropolitan School District of Lawrence Township (hereinafter Lawrence)

The Metropolitan School District of Perry Township (hereinafter Perry)

The Metropolitan School District of Pike Township (hereinafter Pike)

The Metropolitan School District of Warren Township (hereinafter Warren)

The Metropolitan School District of Washington Township (hereinafter Washington)

The Metropolitan School District of Wayne Township (hereinafter Wayne)

School City of Beech Grove (hereinafter Beech Grove)

School Town of Speedway (hereinafter Speedway)

Boone County

Eagle-Union Community School Corporation (hereinafter Eagle)

Johnson County

Greenwood Community School Corporation (hereinafter Greenwood)

Hamilton County

Carmel-Clay Schools (hereinafter Carmel)

Hancock County

Greenfield Community School Corporation (hereinafter Greenfield)

Mt. Vernon Community School Corporation (hereinafter Mt. Vernon)

Hendricks County

Avon Community School Corporation (hereinafter Avon)

Brownsburg Community School Corporation (hereinafter Brownsburg)

Plainfield Community School Corporation (hereinafter Plainfield)

Morgan County

Mooresville Consolidated School Corporation (hereinafter Mooresville)

The geographical areas served by IPS and added defendants, with the exception of Greenfield, and Union Township of Eagle-Union, are reflected on Figure 1. Also represented thereon, for reasons which will hereafter appear, are territories or parts of territories served by certain other school corporations bordering on Marion County, namely, Clark-Pleasant Community School Corporation (Clark) and Center Grove Community School Corporation (Grove) of Johnson County; Delaware and Fall Creek Townships, a part of Hamilton Southeastern School Corporation of Hamilton County; Sugar Creek Township, a part of Southern Hancock County Community Schools (Hancock) of Hancock County; and Moral Township, a part of Northwestern Consolidated School Corporation of Shelby County (Northwestern) of Shelby County.

The intervening defendant Citizens of Indianapolis for Quality Schools, Inc., is a not-for-profit corporation whose members are parents of children in IPS. Its initial attempt to intervene in this action, in opposition to the original complaint of the Government, was denied by this Court, although the Court permitted it to attend the original trial, present argument, and file a brief *amicus curiae*. The ruling was appealed and affirmed. United States v. Board of Sch. Com'rs, Indianapolis, Ind., 466 F.2d 573 (7 Cir. 1972). Subsequently, however, intervention was permitted and intervening defendant participated fully in the most recent trial.

Coalition for Integrated Education is an unincorporated association of individuals favoring a metropolitan plan of school desegregation, which filed a petition for leave to appear *amicus curiae* for the purpose of presenting a desegregation plan, and a supplemental motion for leave to file a brief. The names of the members of the association are attached to the original petition. The motion for leave to file a brief as *amicus curiae* is granted. The Court reserves ruling on the petition to file a plan, as premature.

II.

The Issues

The issues of fact submitted for trial are as follows:

1. Whether or not desegregation of IPS within its present boundaries (sometimes referred to as an "Indianapolis Only Plan") can be accomplished as required by the equal protection clause of the Fourteenth Amendment in such a manner as to "work," within the meaning of Green v. County School Board, 391 U.S. 430, 88 S.Ct. 1689,

20 L.Ed.2d 716 (1968): "The burden on a school board today is to come forward with a plan that promises realistically to work . . ."

2. Whether or not any of the added defendant officials of the State of Indiana, their predecessors in office, or the added defendant The Indiana State Board of Education have acted to promote segregation, or failed to carry out duties imposed upon them by law in such a manner as to promote segregation or inhibit desegregation within IPS.

3. Whether or not any of the added defendant school corporations have acted to promote segregation either within IPS or within their own boundaries.

The issues of law presented are as follows:

1. Whether or not the acts of *de jure* segregation heretofore found to have been practiced by IPS can be imputed to the State of Indiana such that appropriate State officials or agencies may be directed to afford relief to vindicate the Fourteenth Amendment rights of plaintiffs and their class.

2. Whether or not appropriate State officials or agencies have the power to direct reorganization of IPS with other school corporations, or to direct the transfer or exchange of IPS pupils to or with other school corporations in order to vindicate such rights.

3. Whether or not this Court may act in the manner just described to vindicate such rights if responsible officials or agencies of the State fail to do so within a reasonable time.

III.

Viability of an Indianapolis Only Plan

As stated above, the Court in its original opinion expressed some doubts as to whether or not a stable desegregation plan could be established within the confines of IPS, based upon the evidence adduced at that trial, which was all to the effect that when the percentage of Negro pupils in a given school approaches 40%, more or less, the exodus of white pupils from such a school becomes accelerated and irreversible, resulting in resegregation. However, additional evidence on this issue was adduced at the recent trial, and the Court bases its findings exclusively upon such latter evidence.

Having considered such evidence, the Court finds it to be a fact that when the percentage of Negro pupils in a given school approaches 25% to 30%, more or less, in the area served by IPS, the white exodus from such a school district becomes accelerated and continues, as demonstrated by Figure 2. All witnesses agreed that once a school becomes identifiably black, it never reverses to white, in the absence of redistricting. Therefore, progressions from white to black are irreversible once the critical percentage has been reached in the absence of intervention through redistricting. Below the critical percentage, however, schools tend to remain stable, as demonstrated on Figure 3. With further reference to Figure 3, it will be noted that there is one elementary school within IPS which has remained stable over the past five years with a high degree of integration. This lone exception is School 86, which the Court judicially knows to be located in the Butler-Tarkington area of the city, mentioned in the testimony as an area in which the residents, black and white, have worked together for the past several years in a community

relations program designed to maintain the stability of the neighborhood as an integrated community. The results achieved show dramatically that such a program can be made to work, but unfortunately the other statistics illustrate all too well that the Butler-Tarkington situation is the exception and not the rule.

The Court has no reason to find or believe that a crash IPS-wide community relations program, even if one were in progress (and none is), would achieve a system-wide stabilization in time to preserve the entire system from becoming identified as racially black. The Court further finds that, given the present percentage of Negro pupils in the IPS system, which has risen to 41.1% since the previous trial, and the further fact that black enrollment in IPS will in the near future surpass white enrollments therein, as graphically illustrated on Figure 4, the right of plaintiffs and their class to attend schools which are not racially identifiable, as provided by the equal protection clause of the Fourteenth Amendment, cannot be accomplished within the present boundaries of IPS in a way that will work for any significant period of time.

In other words, it is apparent that as a sheer exercise in mathematics, it would be possible for this Court to order desegregation of IPS on a 58.9%-41.1% basis, or some basis similar thereto, so that no school could, for the time being, be racially identifable as a black school. As a matter of fact, IPS announced rather dramatically during the recent trial that such a plan would be put into effect for the coming school year, but rejected such plan at its recent meeting of July 16, 1973, as the Court knows judicially. As demonstrated, however, such a plan, if put into effect, would have the effect of an immediate acceleration of white students into suburban white enclaves or private schools,

so that IPS as a whole would predictably have a black majority within a matter of two or three years. This is not the Court's idea of a plan which "promises realistically to work."

On the other hand, the alternative to such a plan is to limit desegregation to figures which are statistically tolerable insofar as "white flight" is concerned, such as to provide that schools which now contain few or no Negro students accept additional numbers of the minority race, not to exceed perhaps 20% to 30%. Such a plan would, of course, have the effect of affording education in a desegregated setting to those minority race students attending schools in which they would make up the minority of 20% to 30%; but considering the total percentage of minority race students in the IPS system, it is equally obvious that such a plan would leave a large number of schools with a minority percentage in excess of 50%, which would not only make them racially identifable schools, but would once again accelerate white flight from those particular schools.

On this key question as to whether a meaningful desegregation plan could be put into effect within the confines of IPS, the Court heard expert opinions from numerous witnesses called by each side. As usual, they disagreed. However, in the Court's opinion, a clear preponderance of the expert opinion was that no feasible plan could be devised. Those who testified to the contrary tended to qualify their opinions, and in some instances the facts presented by such witnesses simply did not support their conclusions.

For example, Dr. Mercer, a witness called by the Government, testified as to numerous facts having to do with desegration efforts in the State of California, and presented the City of Riverside as a city where desegregation

was apparently working well. However, it developed that the Riverside plan was put into effect voluntarily, accompanied by much community relation effort sponsored by the school and the local news media, and finally that the percentage of minority race students in the entire system was less than 25%. None of these facts have any relation to the situation in Indianapolis. On the other hand, the witness's own Figure 7, which is the last sheet of Government Exhibit 14, discloses the sharp and dramatic drop in "other-white" students in Inglewood, Pasadena, and San Francisco following public announcement that such schools would be required to desegregate, later followed by the filing of legal actions to accomplish such end. (The term "other-white" in California refers to those persons called "Anglos" in Denver and simply "whites" or "Caucasians" in Indianapolis. The California "other-white" is a white who does not have a Spanish surname.)

The testimony of another defense expert, Dr. Hooker, was completely demolished by cross-examination showing that in his published articles he had expressed views opposite to those given in this case, and Dr. Dodson testified that a metropolitan plan would be superior to one limited to IPS.

The solution, therefore, must be to look elsewhere, if this can be done within the law.

IV.

Responsibility of the State of Indiana

In its previous opinion of August 18, 1971, the Court devoted several pages of its opinion to tracing the history of segregation within Indiana beginning 1800, demonstrating that the State, through its legislative, executive, and judicial branches had practiced all manner of discrimina-

tion against Negroes, not only in the field of education, but in housing and innumerable sectors of their social and economic life, as well as in the area of civil rights. 332 F. Supp. pp. 658-665. None of such regrettable history, of which the Court then took judicial notice, has been refuted by any added defendant, with the exception of a quibble about the effect of certain school laws passed in 1961 and thereafter. The Court therefore incorporates such previous history into this opinion by reference, save to the extent that its discussion of Acts of the General Assembly of 1961 and thereafter will be reviewed further hereafter.

Before entering into a discussion as to the specific acts or omissions of State officials having a bearing on the problems of segregation and desegregation, it seems appropriate at this point to set out in detail the role of the State in public education in Indiana, touched upon rather briefly in this Court's previous opinion.

The original seaboard colonies were, of course, founded in the 17th and 18th Centuries, when the concept of public education was unheard of. As a result, such schools which existed therein in the early days were either church supported or were supported strictly by private funds. The relics of that system linger today in various states which evolved from the original colonies so that, for example, the decision in Bradley v. School Board of City of Richmond, Virginia, 462 F.2d 1058 (4 Cir. 1972), (*"Richmond"*), based its decision reversing an order of the District Court for a metropolitan desegregation plan in Richmond and surrounding counties primarily on the basis that the operation of public schools within the different counties of the Commonwealth of Virginia is a matter of local option, and that, if the option be exercised, the power to operate, maintain and supervise the public schools in

a given county is in the exclusive jurisdiction of the local school board and not the state.

However, following the successful conclusion of the Revolutionary War, it was foreseen by the Congress that an educated citizenry was vital to maintaining an enlightened self-government as provided for in the Constitution, and hence the education of all citizens became a concern of the Government. Thus it was that when the Northwest Territory was formed out of lands formerly claimed by the Commonwealth of Virginia, the Northwest Ordinance of 1787 provided:

> "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Art. III.

The State of Indiana along with the states of Michigan, Ohio, Illinois, Wisconsin, etc., were, of course, later formed out of the Northwest Territory, and such states accordingly provided by their respective constitutions for the establishment of systems of public education. The original 1816 Constitution of Indiana, Sections 1 and 2, Article 9, paraphrased the above quoted language from the Northwest Ordiance and provided that it should be the duty of the General Assembly to provide by law for a general system of education, ascending in a regular graduation from township schools to a state university wherein tuition would be free, and equally open to all. Article 8, Section 1, of the present Constitution, adopted in 1851, carries forward the duty of the State in the following language:

> "Knowledge and learning, generally diffused throughout a community, being essenial to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable

means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all."

[1-3] Under the 1851 Indiana Constitution, the common schools as a whole are made a state institution. Ratcliff v. Dick Johnson School Tp., 204 Ind. 525, 185 N.E. 143 (1933); Ehle v. State, 191 Ind. 502, 133 N.E. 748 (1922); City of Lafayette v. Jenners, 10 Ind. 71 (1857). The State owns and maintains the common schools just as it does its public institutions of every kind. State v. Haworth, 122 Ind. 462, 23 N.E. 946 (1890). School corporations within the system only hold title to such schools as trustees and the State has the right to change trustees by annexation at will. Board of School Com'rs v. Center Tp., 143 Ind. 391, 42 N.E. 808 (1896). The legislature may consolidate schools by resolution without notice to the voters or without any referendum or election. Fruit v. Metropolitan Sch. Dis. of Winchester, etc., 241 Ind. 621, 172 N.E.2d 864 (1961).

[4, 5] It was the intention of the framers of the Constitution to place the common schools under the direct control and supervision of the State. Green Castle Township v. Black, 5 Ind. 557 (1854); State v. Eddington, 208 Ind. 160, 195 N.E. 92 (1935). The authority over the schools and school affairs resides exclusively within the dominion of the legislature and the school system is a centralized and not a localized form of school government. Gruber v. State, 196 Ind. 436, 148 N.E. 481 (1925); Jordan v. City of Logansport, 178 Ind. 629, 99 N.E. 1060 (1912); State v. Ogan, 159 Ind. 119, 63 N.E. 227 (1902); State v. Haworth, *supra;* State v. Eddington, *supra.*

[6] Under Article 8 of the Indiana Constitution, the power of the General Assembly to regulate the school sys-

tem is practically unlimited. Kostanzer v. State, 205 Ind. 536, 187 N.E. 337 (1933). The employees of a school corporation undertake their duties not as officers of local units of self government but as officers of the public school system, which is a State institution. State v. Eddington, *supra.*

[7] The General Assembly has the power to prescribe the terms of the employment contracts to be executed by school corporations, Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 58 S.Ct. 443, 82 L.Ed. 685 (1937), and the power to provide a general system of licenses for those desiring to teach. Stone v. Fritts, 169 Ind. 361, 82 N.E. 792 (1907).

[8] While the State in acting directly to carry out its educational functions under Article 8, Section 1, is not forbidden to create and use local corporations for that purpose, it assumes responsibility for the conduct of these corporations. Such corporations were and still are involuntary corporations established as part of the school system of Indiana and are but agents of the State for purposes of administering the State system of education. Indiana ex rel. Anderson v. Brand, *supra;* Campbell v. City of Indianapolis, 155 Ind. 186, 57 N.E. 920 (1900); Freel v. School City of Crawfordsville, 142 Ind. 27, 41 N.E. 312 (1895). Such corporations may only exercise the authority given them by the State, Ratcliff v. Dick Johnson School Tp., *supra;* Ehle v. State, *supra,* and the conduct and practices of these agent corporations must be considered acts of the State. Hummer v. School City of Hartford City, 124 Ind.App. 30, 112 N.E.2d 891 (1953), overruled in part on other grounds, Flowers v. Bd. of Com'rs of County of Vanderburgh, 240 Ind. 668, 168 N.E.2d 224 (1960).

Robinson v. Schneck, 102 Ind. 307, 1 N.E. 698 (1885), held that it was constitutional for the legislature to provide

by general law for local school authorities to levy school taxes. Some of the general language in that case could suggest that local school corporations are to be treated as local units of self-government, as in Virginia. To clear up such an implication, the Supreme Court of Indiana in State v. Haworth, *supra,* made it clear that Robinson did not change the relationship of school corporations as agents of the State. The majority opinion specifically rejected the dissenting opinion's argument based on *Robinson* that the school corporations in the State are units of self-government in which local control of the schools is left with the people within such corporation. The majority held instead that the authority and control of schools and school affairs is vested exclusively in the General Assembly and that such affairs are intrinsically matters of State concern and not of a local jurisdiction. "In such matters, the State is a unit, and the legislature the source of power." To the same effect, see Ft. Wayne Community Schools v. State, 240 Ind. 57, 159 N.E.2d 708 (1959).

To summarize in the words of the court in State v. Mutschler, 232 Ind. 580, 115 N.E.2d 206 (1953):

> "The people of Indiana have translated into a fundamental constitutional postulate the belief that the general diffusion of knowledge and learning throughout a community is essential to the preservation of free government, and in harmony with this constitutional postulate the Constitution recognizes that the business of education is a governmental function *and makes public education a function of state government as distinguished from local government.* . . . It was evidently the intention of the framers of the Constitution to place the common schools under the direct control and supervision of the state, and make it a quasi-department of the state government, *a centralized and not a localized,* form of school government." (Emphasis added.)

The Indiana statutes on education are testimony to the constitutional and decisional history just discussed. The Indiana State Board of Education and its predecessor have been given great powers, and "It shall be the duty of the board to coordinate the work of the various commissions so as to bring about an effective and an (*sic*) unified school program and to make determinations in matters of jurisdiction between such commissions in accordance with the law, but all actions of the commissions within their respective jurisdictions shall be final." The "commissions" are on general education, textbook adoption, and teacher training and licensing. Indiana Code 1971, 20-1-1-1 & 20-1-1-2, Burns Ind.Ann.Stat. (hereinafter "Burns") § 28-101, 28-102.

Following said Section 20-1-1 of the Indiana Code of 1971, the first section having to do with schools, there follow some 349 solid pages of statutes enacted by the General Assembly regulating virtually every phase of school operation, printed single spaced, on unusually wide paper, in a type style reminiscent of that used in the exclusions section of an insurance policy. The annotated version of these laws occupies two complete volumes of Burns, comprising some 1,154 standard pages (but with annotations in small type), exclusive of indices and pocket parts. Burns, Vol. 6, parts 3 and 4. The administrative rules and regulations concerning education consume an additional 126 pages. Burns Ind.Adm.R. & Reg., Title 28. For obvious reasons, the Court will attempt no summary of this vast compendium, except to say generally that all phases of the operation of the public schools are regulated, in one way or another, by the State.

Of particular importance here, however, should be noted the statute, in effect from 1949 until 1972, which

vested in the commission on general education of The Indiana State Board of Education the power and duty to regulate new school sites and buildings or any modifications of or additions to existing buildings, and established a division of schoolhouse planning under a director to be appointed by the state superintendent of public instruction with the approval of the governor. IC 1971, 20-1-2-1 to 20-1-2-6, Burns 28-301 to 28-306. Such law was repealed in 1972, but only because it was at such time replaced by a similar law. IC 1971, 20-1-1-6, as added 1972; Burns 28-109 (Pocket supp.).

Questions identical to those presented in this action have been considered by the Court of Appeals for the Sixth Circuit in Bradley et al. v. Milliken et al., 484 F.2d 215 (1973). In upholding the trial court's determination that a metropolitan remedy would be appropriate to accomplish desegregation of the public schools of Detroit, it based its holding upon discriminatory practices on the part of both the Detroit school board and the State of Michigan found to be "significant, pervasive and causally related" to the segregation in the Detroit school system.

The discriminatory practices of the Detroit school board were, in general, acts of commission identical to those found to have occurred in Indianapolis, such as gerrymandering school attendance zones, making boundary changes which promoted segregation, providing optional attendance zones in "changing" areas, assigning teachers and staff so as to mirror the racial complexion of a school's student body, assigning students to elementary and high schools according to the racial patterns of the feeder schools, selecting sites for new schools and building additions to existing schools in such a fashion as to separate the races, etc.

As between the four discriminatory practices charged to the State, the Sixth Circuit held:

> "The clearest example of direct State participation in encouraging the segregated condition of Detroit public schools, however, is that of school construction in Detroit and the surrounding suburban areas. Until 1962 the State Board of Education had direct statutory control over site planning for new school construction. During that time, as was pointed out above, the State approved school construction which fostered segregation throughout the Detroit Metropolitan area . . . . Since 1962 the State Board has continued to be involved in approval of school construction plans."

[9] In the case at hand the evidence shows that Arlington High School was opened in 1961 with a Negro enrollment of 0.23%, Northwest High School was opened in 1963 with a Negro enrollment of 0.0%, and John Marshall High School was opened in 1967 with a Negro enrollment of 0.3. Inspection of maps in evidence discloses that Arlington is less than a mile from the extreme northeast corner of IPS, Marshall is squarely on the extreme east line of IPS, and Northwest slightly less than a mile from the extreme west line of IPS. This Court found in its previous opinion, and finds once again, that the placement of such schools constituted acts of *de jure* segregation on the part of IPS. The former holding has already been affirmed by the Seventh Circuit, 474 F.2d at pp. 87, 88. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

Here, as in Michigan, the sites for the three high schools mentioned were necessarily approved by the appropriate agencies of defendants The Indiana State Board of Education and the Superintendent of Public Instruction. On the authority of *Bradley*, these were acts of *de jure*

segregation on the part of officials of the State. Similar examples could be pointed out with regard to site selection for construction and enlargement of elementary schools, but the foregoing examples are so obvious that there is no need to labor the point.

[10] Further, at all times since 1949, the Indiana statute forbidding racial segregation in educational opportunity has been in effect, IC 1971, 20-8-6-1 et seq., Burns 28-6106 et seq., and the mandate of the Supreme Court of the United States in Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), has been the law since 1954. According to the evidence in this case, the officials of the State charged with oversight of the common schools have done almost literally nothing, and certainly next to nothing, to furnish leadership, guidance, and direction in this critical area. Even at this late date, the division of equal educational opportunity of the Indiana Department of Public Instruction, headed by the State Superintendent, consists of but four staff members and a secretary, to cover the entire State of Indiana, and has only been in existence for the past two years pursuant to a Federal grant. The Court finds that the failure of the State Superintendent and the Board of Education to act affirmatively in support of the law was an omission tending to inhibit desegregation.

V.

Acts of Added Defendant School Corporations

There was no evidence that any of the added defendant school corporations have committed acts of *de jure* segregation directed against Negro students living within their respective borders. In fact, the evidence shows that, with a few exceptions, none of the added defendants have had

the opportunity to commit such overt acts because the Negro population residing within the borders of such defendants ranges from slight to none, as illustrated on Figure 5. However, with respect to the added defendants situate within Marion County, the evidence is that when the Marion County School Reorganization Committee, appointed pursuant to the Indiana School Reorganization Act of 1959, IC 1971, 20-4-1-2, Burns 28-3501 et seq., made its initial and unanimous recommendation that all of the school systems in Marion County be merged into one metropolitan system, the added Marion County defendants were unanimous in their opposition to the plan (which was, however, favored by IPS). Subsequently, and for the stated reason that in its opinion the metropolitan plan could not be adopted in view of the suburban opposition, the Reorganization Committee completely reversed itself and proposed a plan which, with minor exceptions having to do with areas within Center Township, froze all existing school corporations in Marion County according to their then existing 1961 boundaries.

Thus school reorganization in Marion County, rather than reorganizing anything except the name and method of school government as to certain added defendants, did nothing at all. By way of contrast, the evidence is that on a state-wide basis reorganizations pursuant to the Act of 1959 ultimately resulted in reducing the number of school corporations by approximately 50%, and created school corporations merging what had formerly been separate corporations in cities, towns, and their adjoining unincorporated areas, as well as merging what had formerly been separate township systems into consolidated systems. Some of the latter mergers extended across county lines, as reflected by defendant Wayne's Exhibit D. As to IPS,

this farcical "reorganization" had the effect of making it technically a reorganized school corporation, and thus hampered its ability to be further reorganized without complying with all of the cumbersome procedures of the 1959 Act and other crippling legislation.

That the added defendants had a legal right to resist the recommendation of the School Reorganization Committee under existing law cannot be denied. At the same time, it is apparent that confining IPS to its existing territory had the effect, which continues, of making it first difficult and now impossible to comply with the law requiring meaningful desegregation.

At this point the Court deems it appropriate to consider briefly the question as to why Figure 5 reflects such a remarkable absence of Negro citizens from the territories of the added defendants with the exception of Washington and Pike (those Negro citizens residing in Wayne are concentrated in that part of Wayne which is within IPS, according to school enrollment figures). Such absence is particularly glaring under the evidence, which reflects virtually no Negroes in Speedway, which has within its borders Detroit Diesel Allison Division of General Motors Corporation, the largest single employer of labor in Marion County; virtually none in Beech Grove, which houses the shops of the Penn Central Transportation Company; virtually none in Warren outside IPS, although Western Electric, situate in Warren Township, employs thousands of persons who busily make all of the telephones for American Telephone and Telegraph. Equally remarkable is the absence of Negroes from Lawrence which has the vast Army Finance Center located some two miles east of its high school. Either it must be concluded that Negroes, unlike other citizens, simply do not like to live

near their places of employment (and all of the employers mentioned are equal opportunity employers), or there must be some other reason.

In *Richmond* the court said, among other things, "We think that the root causes of the concentration of blacks in the inner cities of America are simply not known . . ." This Court finds that statement incredible. Although it is undoubtedly true that many factors enter into demographic patterns, there can be little doubt that the principal factor which has caused members of the Negro race to be confined to living in certain limited areas (commonly called ghettos) in the urban centers in the north, including Indianapolis, has been racial discrimination in housing which has prevented them from living any place else.

In the trial just concluded a witness called by the added defendants conceded that Negroes have been severely limited in their search for housing in the Indianapolis area to properties advertised in local newspapers as "for colored," and experts called by the Government testified that discrimination has been a root cause of the black central city phenomenon.

The Court sees no point in laboring the obvious. If racial discrimination did not exist in the United States, Indiana, and the Indianapolis metropolitan area, it would not be necessary to have laws against it. Yet the past ten years have brought forth a spate of such laws, local and national, preceded by reports of investigating commissions without end, all pointing up what every citizen knows—that discrimination is yet with us in a nation which daily pledges that it is ". . . one nation, under God, *indivisible,* with liberty and justice for *all.*"

Such racial discrimination, which has been tolerated by the State at the least, in some instances has been actively

encouraged by the State, as set out in this Court's previous opinion, has had, as its end result, the creation of an artificial unrepresentative community, as pictured by the exhibits in this case. At the very least it may be said that Negroes have consistently been deprived of the privilege of living within the territory of the added defendants by reason of the customs and usages of the communities embraced within such boundaries, and of the State.

The foregoing should not be taken to mean that this action is one having to do with discrimination in housing, and this Court does not consider that a school desegregation action is one in which it is appropriate to attempt to remedy such discrimination, past or present. However, when it may be demonstrated that, as here, the discriminatory customs and usages mentioned have had a demonstrably causal relationship to segregation in the schools, such factor should not be casually swept under the table as in *Richmond*.

VI.

Conclusions of Law

The Court concludes, as a matter of law, as follows:

[11] 1. The acts of *de jure* segregation heretofore found to have been practiced by IPS can be, and are imputed to the State of Indiana.

2. The Superintendent of Public Instruction, The Indiana State Board of Education, and other responsible agents and agencies of the State of Indiana, and the State itself, have each practiced *de jure* segregation, both by commission and omission.

[12] 3. The General Assembly of the State of Indiana has the power, and it is its duty, to devise a metro-

politan plan of common school education in the Indianapolis metropolitan area, which may be to direct the reorganization of IPS with other school corporations, in whole or in part, or to direct the transfer or exchange of IPS pupils to or with other school corporations, in such a manner as to vindicate the Fourteenth Amendment rights of plaintiffs and all Negro children presently within the jurisdiction of IPS to attend desegregated, non-racially identifiable schools.

4. If the General Assembly fails to act in the manner described within a reasonable time, this Court has the power and the duty to devise its own plan, and to order the defendant and the added defendant school corporations, State Superintendent of Public Instruction, and The Indiana State Board of Education to implement the same.

[13] In short, paraphrasing the holding of the Sixth Circuit in Bradley et al. v. Milliken et al., *supra,* this Court holds that the record establishes that the State has committed *de jure* acts of segregation and that the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts. There can be little doubt that a federal court has both the power and the duty to effect a feasible desegregation plan. Indeed, such is the essence of *Brown II.* Brown v. Board of Education, 349 U.S. 294, 300-301, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). In the instant case the only feasible desegregation plan involves the crossing of the boundary lines between IPS and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan. The power to disregard such artificial barriers is all the more clear where, as here, the State has been guilty of discrimination which had the effect of creating and maintaining racial segregation along school district lines. United States

v. Scotland Neck Board of Education, 407 U.S. 484, 489, 92 S.Ct. 2214, 33 L.Ed.2d 75 (1972); Wright v. City of Emporia, 407 U.S. 451, 463, 92 S.Ct. 2196, 33 L.Ed.2d 51 (1972); United States v. State of Texas, 447 F.2d 441, 443-444 (5 Cir. 1971); Haney v. County Board of Education of Sevier County, 429 F2d 364, 368 (8 Cir. 1970). See also Davis v. Board of School Commissioners, 402 U.S. 33, 36-38, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971).

There exists, however, an even more compelling basis for this Court's crossing artificial boundary lines to cure the State's constitutional violations. The instant case calls up haunting memories of the now long overruled and discredited "separate but equal doctrine" of Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). If we hold that school district boundaries are absolute barriers to an IPS school desegregation plan, we would be opening a way to nullify Brown v. Board of Education which overruled *Plessy, supra.*

VII.

The Area of a Viable Metropolitan Plan

In considering a metropolitan plan, it is apparent that, to name a few factors, the area should be reasonably compact in size in relation to is center, should not be separated by massive natural obstacles, and otherwise should be adaptable to the reasonably speedy transportation of school children. Also, it would seem only reasonable to examine whether or not the area to be considered has significant common interests with the area hub. The Court now examines the situation with regard to the area depicted on Figure 1.

In the first place, the Court knows judicially that the entire area consists of virtually flat land, gently sloping

from the northeast to the southwest with a fall of approximately 150 to 200 feet in approximately 35 miles. The area contains no natural barriers of any consequence; two fairly sizeable reservoirs, Giest and Eagle Creek, are located northeast and northwest, respectively, and pose no obstacle to movement of people to or from the center of the area, while White River is little larger than a robust creek, and is crossed by numerous bridges. With a very few exceptions, such as added defendants in their roles as employers, all industrial plants and other major places of employment within the area are concentrated either within the boundaries of IPS or are within a few city blocks of such boundaries in Wayne and Warren Townships and the towns of Speedway and Beech Grove. Indeed, as the evidence discloses, many of the added defendant school corporations are the largest single employers of labor within their respective borders!

The employment situation is represented on Figure 6, which shows graphically that, with the exception of the City of Greenfield (not shown on Figure 1), more than half (in most cases more than 60%) of the residents of each unit shown on Figure 1 are employed in Marion County—as a practical matter in IPS, or within a few city blocks thereof. If the rather substantial number of workers who did not list their place of employment are distributed in proportion to those who did, it is apparent that the true percentage of Marion County workers in the area is even higher than as indicated.

The employment picture just described results in huge flows of traffic from the "bedroom" townships primarily to Center, Warren and Wayne Townships of Marion County each weekday morning, and back again each evening. In order to accommodate this flow of traffic, the

Indinapolis area, with a huge assist from the Federal government, is blessed with an extraordinarily efficient highway network. The central area is completely looped by Interstate Highway I-465, a six-lane, divided, limited access highway, typical of such highways in the Interstate System. The loop varies in its distance from Monument Circle, the hub of downtown Indianapolis, from as little as 4.50 miles, due south, to as much as 11.50 miles to the northwest, averaging perhaps six or seven miles in distance from such central reference point. Additionally there are no less than seven additional legs of Interstate highways branching off of I-465, and in some instances, coming inside the I-465 loop. Specifically, I-74 runs northwest and southeast from I-465, I-69 runs northeast from I-465, I-70 runs southwest and due east from I-465 (with construction in progress to link up both legs through the center of this city), and I-65 runs northwest and southeast from I-465 (I-65 will also link both of its legs through the center of the city, and the north leg is already open from I-465 to 11th and Meridian Streets, in downtown Indianapolis).

In addition, there are many other multilane highways leading into, out of, and through the central area, many of which are divided, such as S. R. 67 to the southwest and northeast, U. S. 40 due east and west, S. R. 431 and U. S. 31, each running due north and south to southeast, S. R. 37 south and northeast, and S. R. 100, running along the north and east sides, just inside I-465. Such routes, and other main highways, are illustrated on Figure 7.

Virtually all points of interest for cultural, sports, and higher educational activities are located within IPS. For example, as the Court knows judicially, Butler University, Marian College, Indiana Central College, the Indianapolis campus of Indiana and Purdue Universities are so located,

as are the Indianapolis Zoo, the Children's Museum, the Indiana State Fairgrounds, the Indiana Capitol and office buildings, all major federal offices, Clowes Hall (an outstanding theater for the performing arts), the Indianapolis Sports Arena, the Indianapolis Convention Center, etc. The Indianapolis Art Museum directly adjoins an IPS boundary, as does the Indianapolis Motor Speedway (located in Speedway).

Just as the working parents of the suburbs drive back and forth to work each day, so are most suburban children bused to and from school. As shown on Figure 8, out of 114,696 students in suburban schools, 90,266 or 78.7% are bused. The State reimburses each school corporation a portion of the cost of busing each child. (Also, it should be noted, the State reimburses each added defendant, except Speedway, a substantial portion of its costs of operation, according to a complicated formula.) These bus routes are extremely time consuming, as anyone knows who has the misfortune to follow a bus down the highway, since the custom in the suburban areas is to pick up the children on virtually an individual basis. However, assuming that children walk to a central school or other convenient point, such as most IPS pupils do, and are then transported non-stop to their designated school of attendance via the major traffic arteries (during which period of transportation they would be going opposite to the flow of commuter traffic, and hence not impeded by it) the Court is of the opinion that—given logical and most convenient assignments—virtually all students could be delivered in thirty minutes. Thirty or even forty-five minutes is not an unreasonable time, and altogether comparable to that required for such transportation elsewhere in Indiana.

As shown in Figure 4, previously referred to, the white pupil enrollment within IPS is sharply falling, while that of Negro pupils is rising. On the other hand, the population of each area in which added defendants operate their schools, and the areas of non-defendant school districts adjoining Marion County are rapidly rising in population, virtually all white. These changes are illustrated in Figures 9, 10, and 11.

It was argued by added defendants that the Negro birth rate and in-migration had declined to the point where further increase in the black school population would not occur. This not only begs the question of white migration to the suburbs, but cannot be demonstrated statistically, as shown by Figure 12, reflecting that estimated black enrollments in grade 1 in 1973 virtually equal black births in Indianapolis in 1967—an obvious statistical improbability without continued in-migration.

With regard to the defendant Greenfield, Union Township of Eagle-Union and certain omitted townships of the non-defendants Hamilton Southeastern, Southern Hancock, and Northwestern, the Court is of the opinion that the distances involved are impractical, and therefore makes no recommendation that they be included in a metropolitan plan. The Court does recommend that all other added defendants be included in the metropolitan plan, as well as Eagle-Union to the extent of Eagle Township.

The Court observes that, on the basis of the applicable figures, the General Assembly may also wish to add the non-defendants Center Grove, Clark-Pleasant, Southern Hancock, Hamilton Southeastern to the extent of Delaware and Fall Creek Townships, and Northwestern to the extent of Moral Township to the plan. Its ability to do so is undoubted. State v. Mutschler, *supra*. However, the Court

can make no finding or recommendation with respect to these corporations until such time as they have had their day in court. Intervening plaintiffs are directed to interplead such corporations as additional added defendants forthwith.

VIII.

Constitutionality of Certain Indiana Statutes

Questions posed by the Court in its previous opinion inquired as to the constitutionality of certain Indiana statutes, specifically Chapter 186 of the Acts of 1961, IC 1971, 20-3-14-1, 20-3-14-10, Burns 28-2338, 28-2346, 28-2347 (1968 Cum.Supp.); Chapter 52 of the Acts of 1969, IC 1971, 20-3-14-9 Burns 28-2346a (1970 Cum.Supp.), and Chapter 173 of the Acts of 1969, IC 1971, 18-4-1-1 to 18-4-5-4, Burns 48-9101 et seq.

In the opinion of the Court such statutes, along with the application or the misapplication of the School Reorganization Act of 1959, certainly placed IPS in a strait jacket. However, in view of the Court's other findings and conclusions, it is unnecessary to consider the question of unconstitutionality.

IX.

Interim Relief

[14] The Court is of the opinion that it would be without jurisdiction to order the exchange of pupils between IPS and added defendants at this time. It is Negro children of IPS and not suburban children who are being deprived of a constitutional right, and so long as the various school corporations remain separate the Court believes that it would have no basis to direct that a suburban child be transported out of its own school corporation. However,

the Court knows of no reason why added defendants should not immediately accept a reasonable number of Negro children from IPS on a transfer basis, effective as of the beginning of the 1973-74 school year, and it is so ordered. In this connection, the evidence shows that virtually all added defendants routinely exchange or transfer pupils for various educational purposes. The Court can think of no more important form of special education for a Negro child than going to school in an integrated environment.

As shown by the evidence, Negro pupils constituted 39.5% of the 1972-73 enrollment of IPS, but constituted but 24.3% of the total enrollment in Marion County and 19.5% of the total enrollment in the Figure 1 area for the same period. Although a perfect racial balance in each school is not required by law and will not be ordered, the General Assembly will presumably give careful consideration to these relative percentages. Also, the General Assembly should keep in mind that "tokenism" will not, in the Court's opinion, meet constitutional requirements.

With respect to IPS itself, it is not true that children of both races may not be transported or otherwise exchanged. As repeatedly pointed out by this and all other Federal courts in the land, following, as we must, the pronouncements of the Supreme Court of the United States, there is nothing sacred about the attendance zones within a school corporation, no constitutional right in a student to attend a particular school (except that a child of a minority race has a right to attend a desegregated school), and so IPS must immediately take steps to reduce the amount of segregation in its system. However, final relief cannot be had until the General Assembly acts, or this Court is compelled to devise its own plan because of default on the part of the General Assembly.

The Court has given consideration to the average daily attendance in the various schools of added defendants, as shown by the evidence, and is pleased to note that such averages are all well below that permitted by State authorities. If each school accepted transfer of 5% of its present enrollment, this would amount to an average of little more than one child per classroom, which is certainly a reasonable figure and one well below what the Court believes a proper metropolitan plan should accomplish. However, exceptions should be noted in two instances—that of Pike and Washington.

Washington already has a Negro percentage of 11.29% and Pike a percentage of 8.17%. Washington has an exemplary record of fair treatment of its minority students, and has also aggressively added minority race members to its faculty and staff. Primarily, however, because of their present minority enrollments, transfers to these added defendants should be limited.

It is therefore considered and ordered that, as interim measures, the following be accomplished prior to the beginning of the 1973-74 school year:

1. IPS is directed to transfer to each of the added defendants, except Washington and Pike, a number of Negro students equal to 5% of the total 1972-73 enrollment of each transferee school, respectively, to transfer to Washington 1% of its 1972-73 white enrollment, and to Pike 2% of its white enrollment for the same school year. Provided, however, that the number of students who attended school in Union Township of Boone County for each school year shall be deducted from the Eagle-Union total before applying said percentage.

2. IPS shall not be required to transfer kindergarten students, nor students commencing their twelfth year. The

numbers of students in such grades enrolled in added defendants' schools for the year 1972-73 shall, however, be counted in arriving at the total to which the applicable percentage figure shall be applied.

3. Each of the added defendants is directed to accept such transferee students and enroll them accordingly.

4. The cost of transportation and tuition of such students shall be the obligation of IPS; provided, that IPS shall be entitled to a credit for any excess State reimbursement paid to a transferee corporation if any, as a result of the presence of transferred pupils.

5. If any teachers presently employed by IPS are rendered surplus as a result of this order, and additional teachers are needed by any added defendant as a result hereof, first consideration shall be given by such added defendant to employing a qualified IPS teacher.

6. The added defendants and IPS, through their respective boards, superintendents, or other designated agents are ordered to meet together forthwith, and to continue to meet until the various logistical problems made necessary by this order are resolved. Unresolved issues, if any, may be referred to the Court for ruling.

7. IPS is directed to rearrange the enrollment patterns in its elementary schools, effective at the beginning of the 1973-74 school year, such that each school will have a minimum Negro enrollment of in the area of 15%. The pairing or clustering of schools, and realignment of school assignment zones will be employed. Pairing or clustering should be of schools in close proximity, if possible. Such action will result merely in an expansion of the neighborhood or community school concept, and reduce the necessity of busing. If after utilizing such procedures, certain

schools do not meet the required numbers, pairing or clustering of schools in non-contiguous zones will be resorted to. *Swann,* 402 U.S. at 28, 91 S.Ct. 1267.

8. If transportation of pupils is required to accomplish the result just ordered, IPS and defendant officials of IPS are instructed that transportation of students of the two races shall be generally proportionate. However, nothing herein should be construed as preventing IPS from closing obsolete, heavily black schools if no longer needed for student housing, and in such event it will necessarily follow, in some cases, that a disproportionate number of black students will require transportation.

9. IPS is further directed to rearrange the feeder patterns of its high schools, so as to secure enrollment of Negro students in each school more nearly approaching their numbers in the system. Specifically, the number of such students in Thomas C. Howe High School should be increased to the area of 25%, and that at Shortridge reduced to not more than the area of 60%. In making transfers of high school pupils to added defendants, the Board should also keep in mind that Negro percentages at Arlington and Broad Ripple are already somewhat past the 40% level, and should be reduced, if possible.

10. All defendants who have not done so are directed to institute appropriate in-service training courses for their respective faculties and staff, and otherwise to orient their thinking and those of their pupils toward alleviating the problems of segregation.

In this last connection, the Court was pleased to learn from the evidence of the recognition given to Negro students by their fellow white students in the few suburban schools which they attend, and of the honors, both scho-

lastic and otherwise, which such Negro students have earned in such schools. These facts, put in evidence by added defendants, indicate to the Court that children are basically inclined towards judging each other on the merits and that, if permitted to follow their own decent instincts, will accept each other on the basis of equality, without racial hatred. There just may be a message in this evidence for the adult world.

11. John O. Moss and John Preston Ward, attorneys for the intervening plaintiffs and their class, are entitled to recover their reasonable attorneys fees and expenses, and intervening plaintiffs are entitled to recover their costs. Such attorneys are directed to submit their respective petitions for fees and allowances. Apportionment of the cost of same is reserved.

12. The Court retains continuing jurisdiction herein.

All of the above is considered ordered, and adjudged this 20th day of July, 1973.

Cite as 368 F.Supp. 1191 (1973)

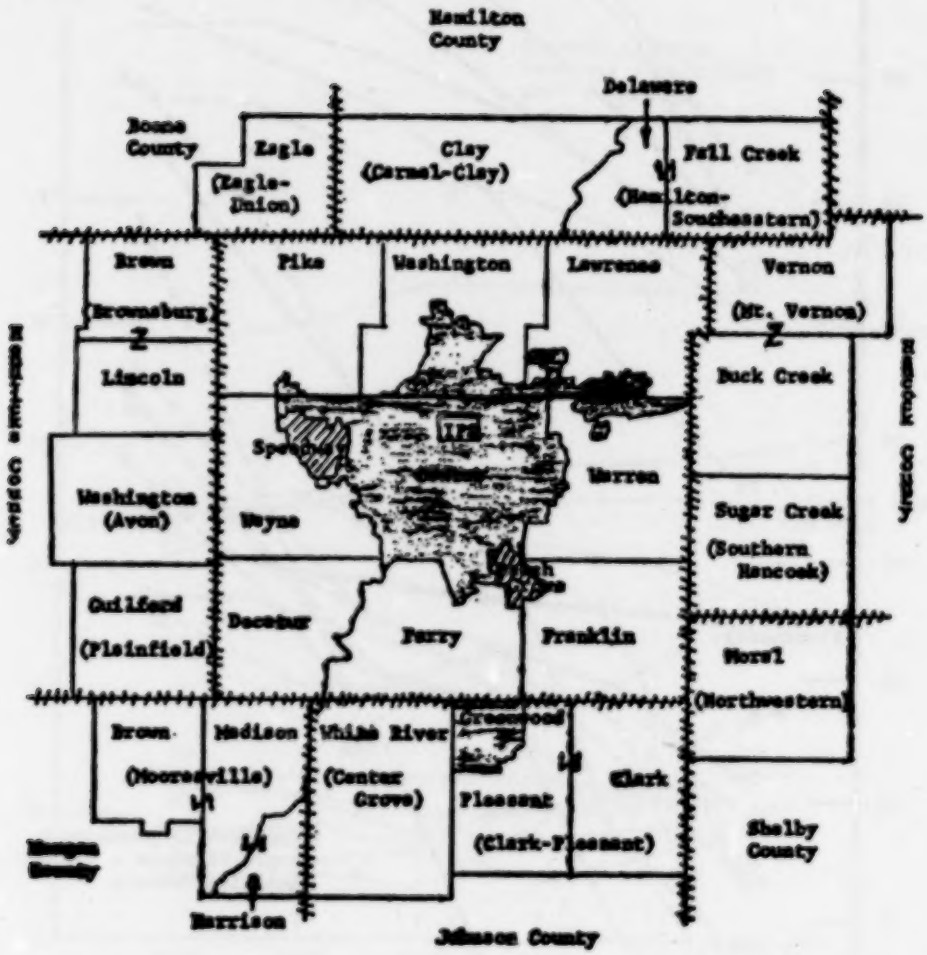
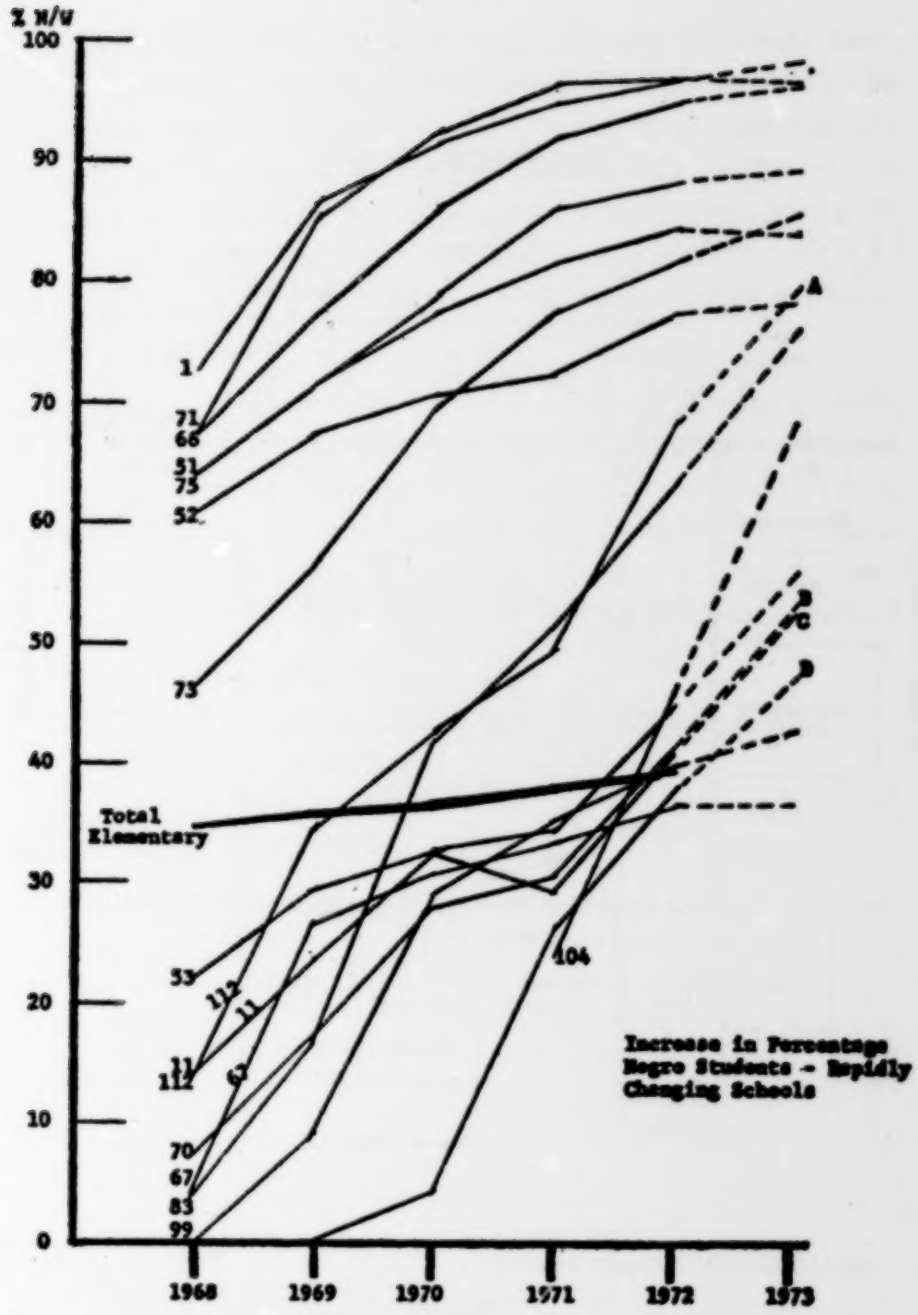


Fig. 1



Key: A Public Housing Unit Opened 6/69
B Some Blacks Transferred Out, Whites In 1971
C Some Blacks Transferred Out, Whites In 1971
D Two Public Housing Units Opened 12/70

Fig. 2

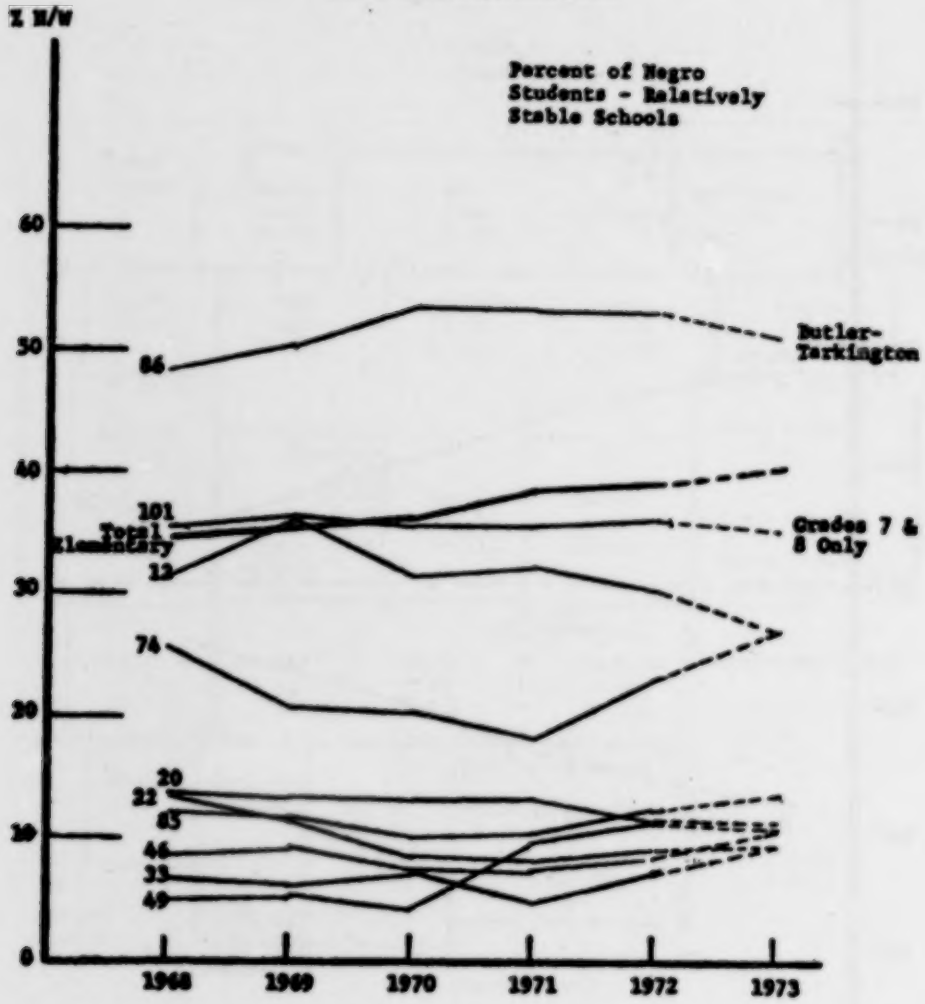

% N/W
Percent of Negro Students - Relatively Stable Schools
60
50
40
30
20
10
0
86
Butler-Tarkington
101
Total Elementary
12
Grades 7 & 8 Only
74
20
22
85
46
33
49
1968
1969
1970
1971
1972
1973

Fig. 3

Per Cent White - Non-White Students - IPS

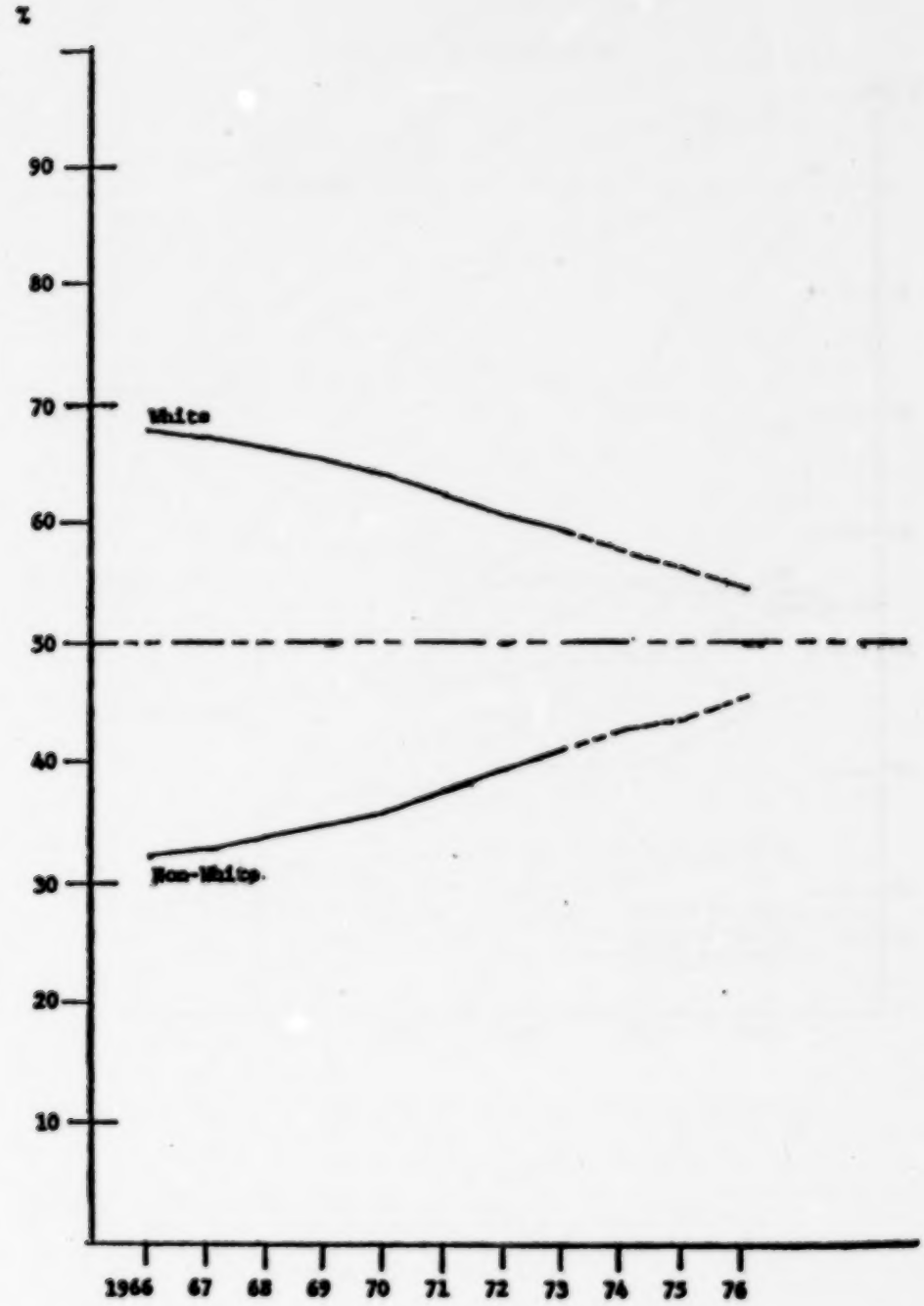


Fig. 4

Cite as 369 F.Supp. 1191 (1973)

Percent of Negro Residents in Marion County and Surrounding Townships
(Percent of Negro Students in School Systems)

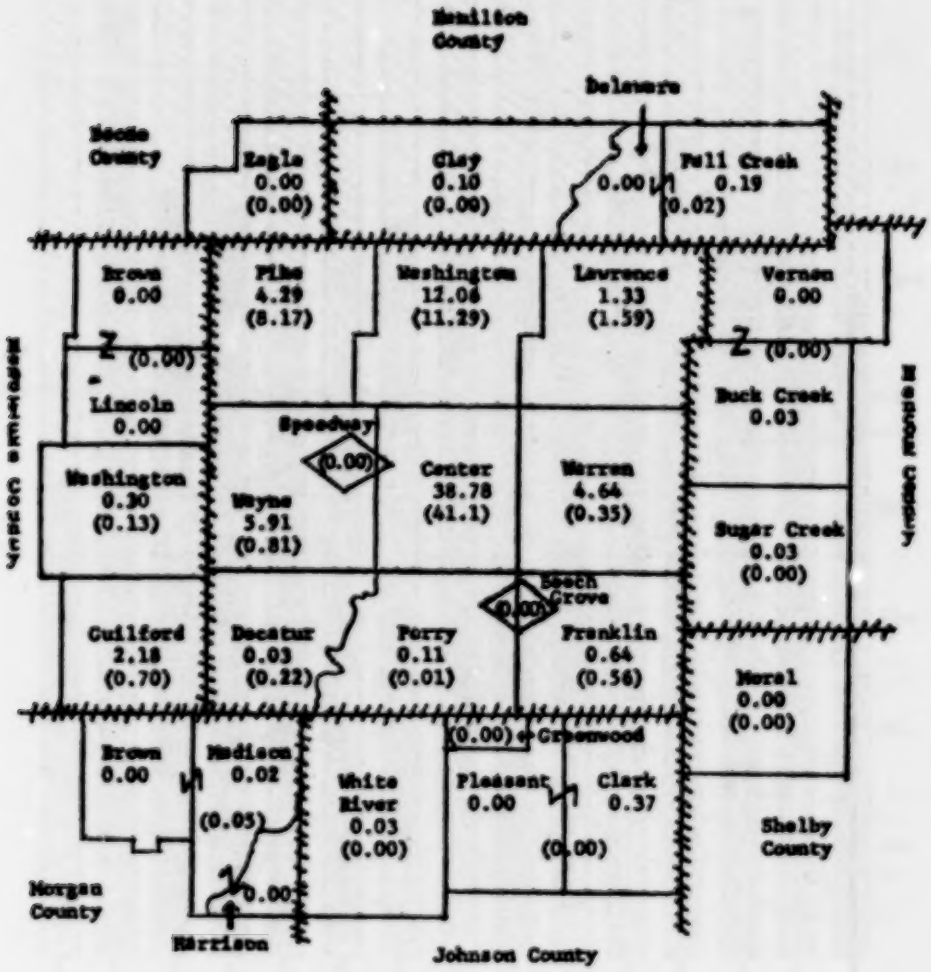
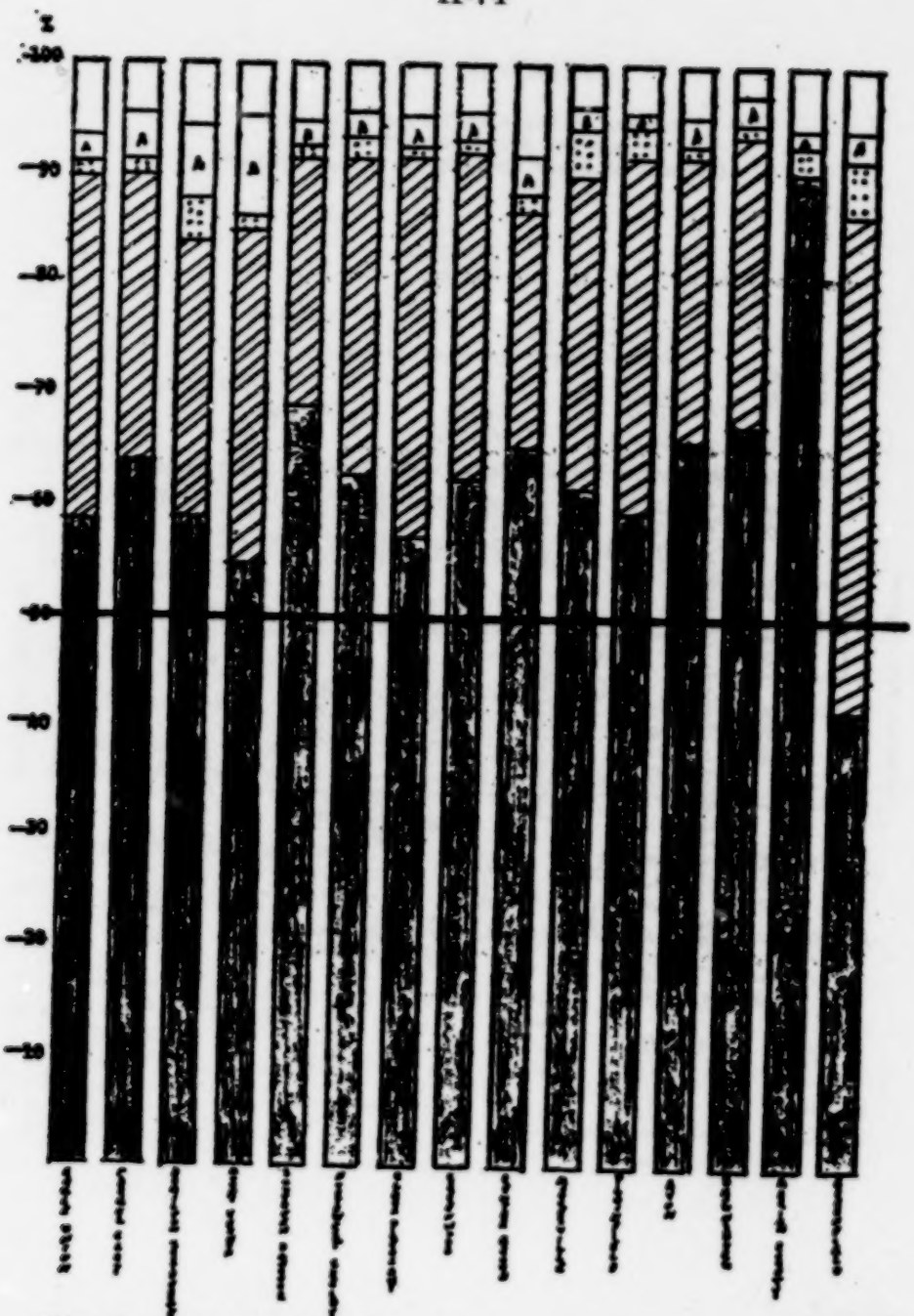


Fig. 5



Place of work of all workers living in Marion County, School Districts surrounding Marion County, and City of Greenfield. (Source: Plaintiffs' Ex. 37; Carmel-Clay Ex. FF)

Fig. 6

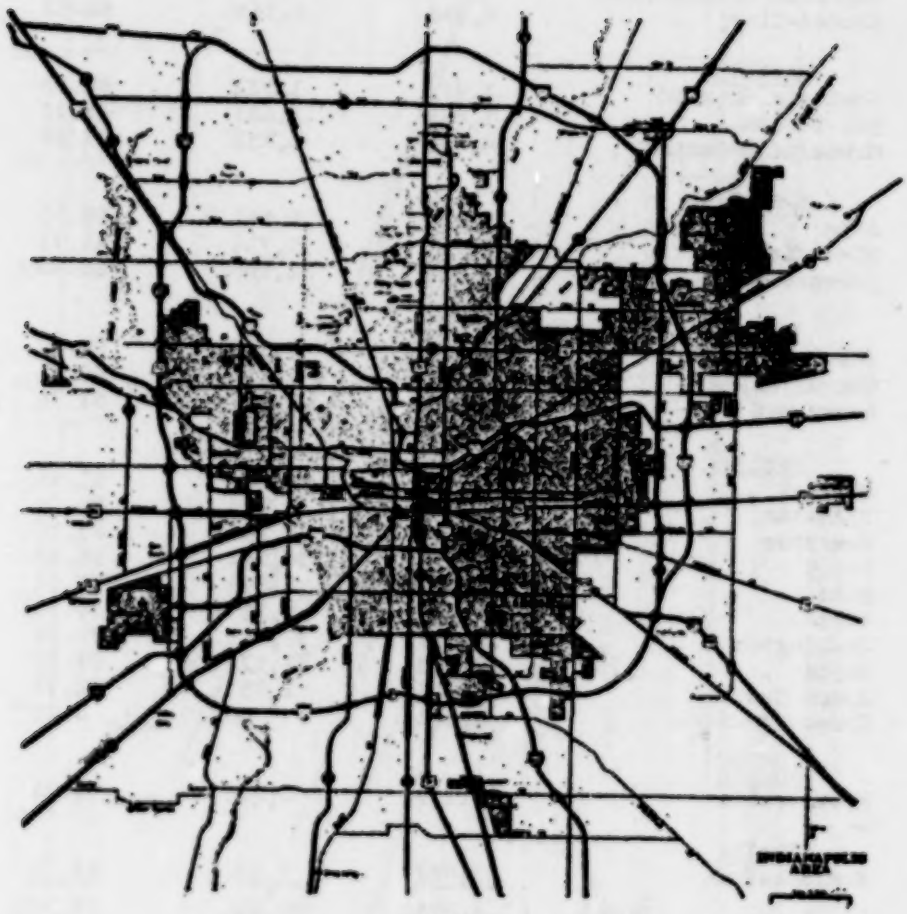


Fig. 7

Pupils Bused, 1971-72
(Other than Indianapolis)

	Pupils	Pupils Bused	% Bused
Boone			
Eagle-Union	1,738	1,293	74.39
Hamilton			
Hamilton-Southeastern	1,722	1,593	92.50
Carmel-Clay	6,196	4,115	66.41
Hancock			
Southern Hancock	1,895	1,722	90.87
Mt. Vernon	1,826	1,483	81.21
Greenfield-Central	4,156	1,733	41.69
Hendricks			
Avon	2,129	2,045	96.05
Plainfield	3,731	1,714	45.93
Brownsburg	3,333	2,198	65.94
Johnson			
Clark-Pleasant	2,738	2,533	92.51
Center Grove	2,920	2,754	94.31
Greenwood	3,383	2,766	81.76
Marion			
Decatur	4,706	4,304	91.45
Franklin	2,646	2,378	89.47
Lawrence	9,625	7,806	81.10
Perry	13,254	10,143	76.52
Pike	3,199	2,999	93.74
Warren	10,202	9,255	90.71
Washington	15,675	12,115	77.28
Wayne	12,652	11,175	88.51
Beech Grove	2,818	1,757	62.34
Speedway	2,482	0	0.00
Morgan			
Mooresville	3,959	2,286	57.74
Shelby			
Northwestern	1,867	1,832	98.12
Total	114,696	90,266	78.70%

Source: Reports A and F of
Plaintiffs' Exhibit 10

Cite as 368 F.Supp. 1191 (1973)

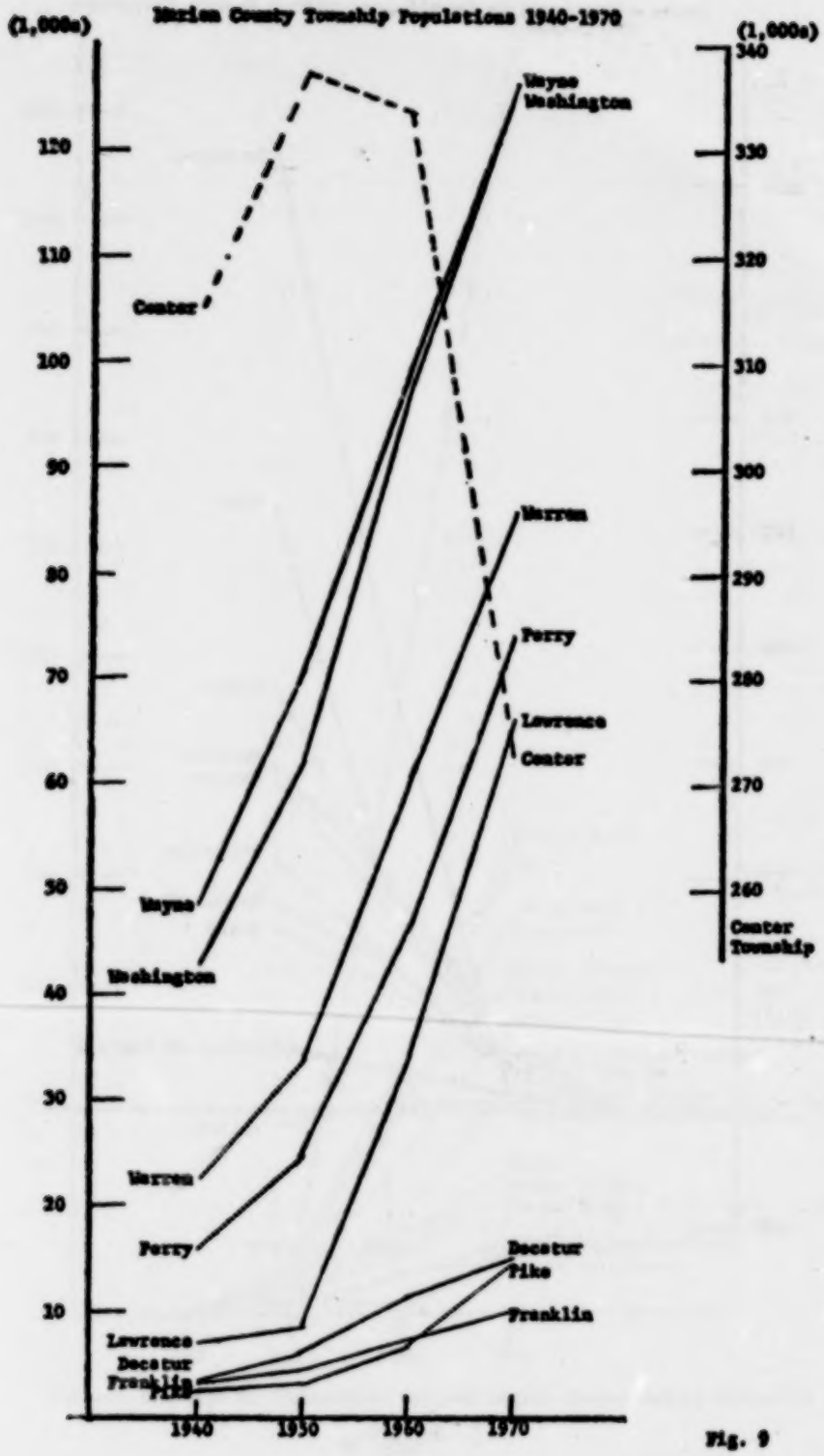


Fig. 9

Percent Increase in Population: Marion County Townships

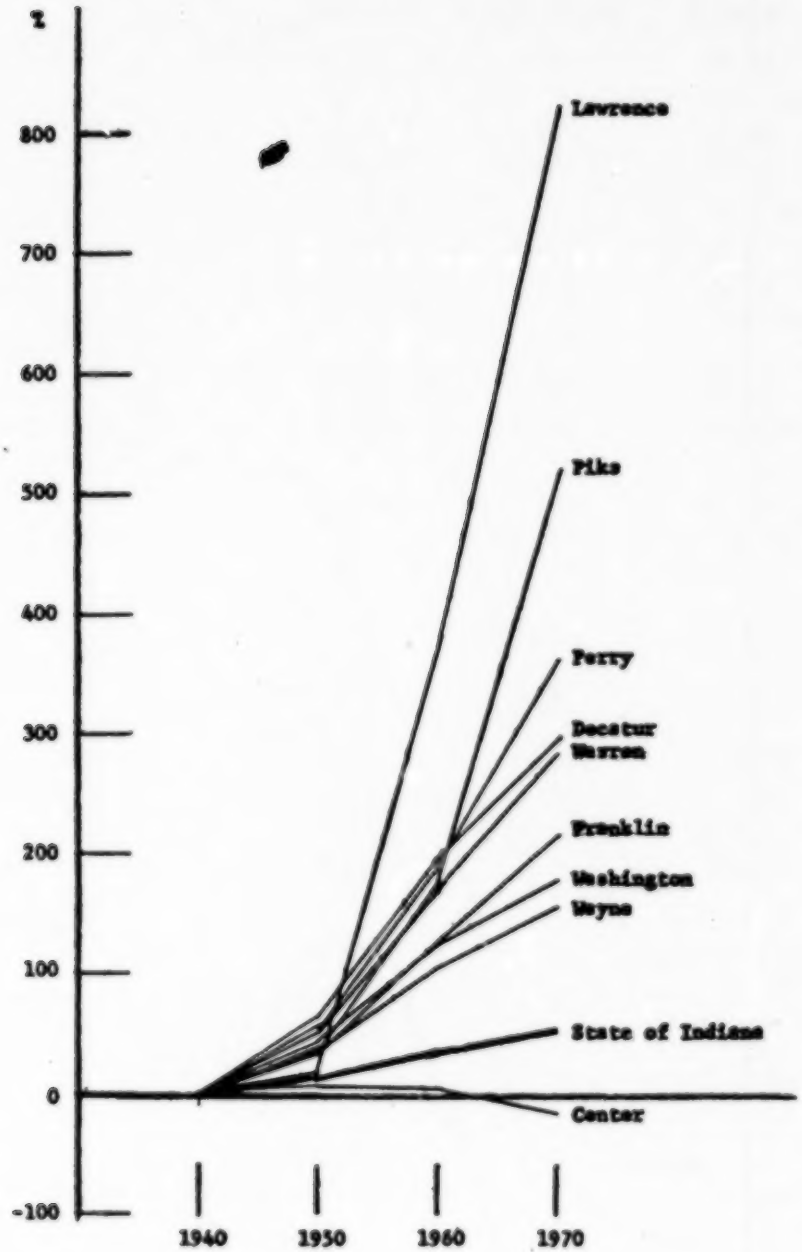
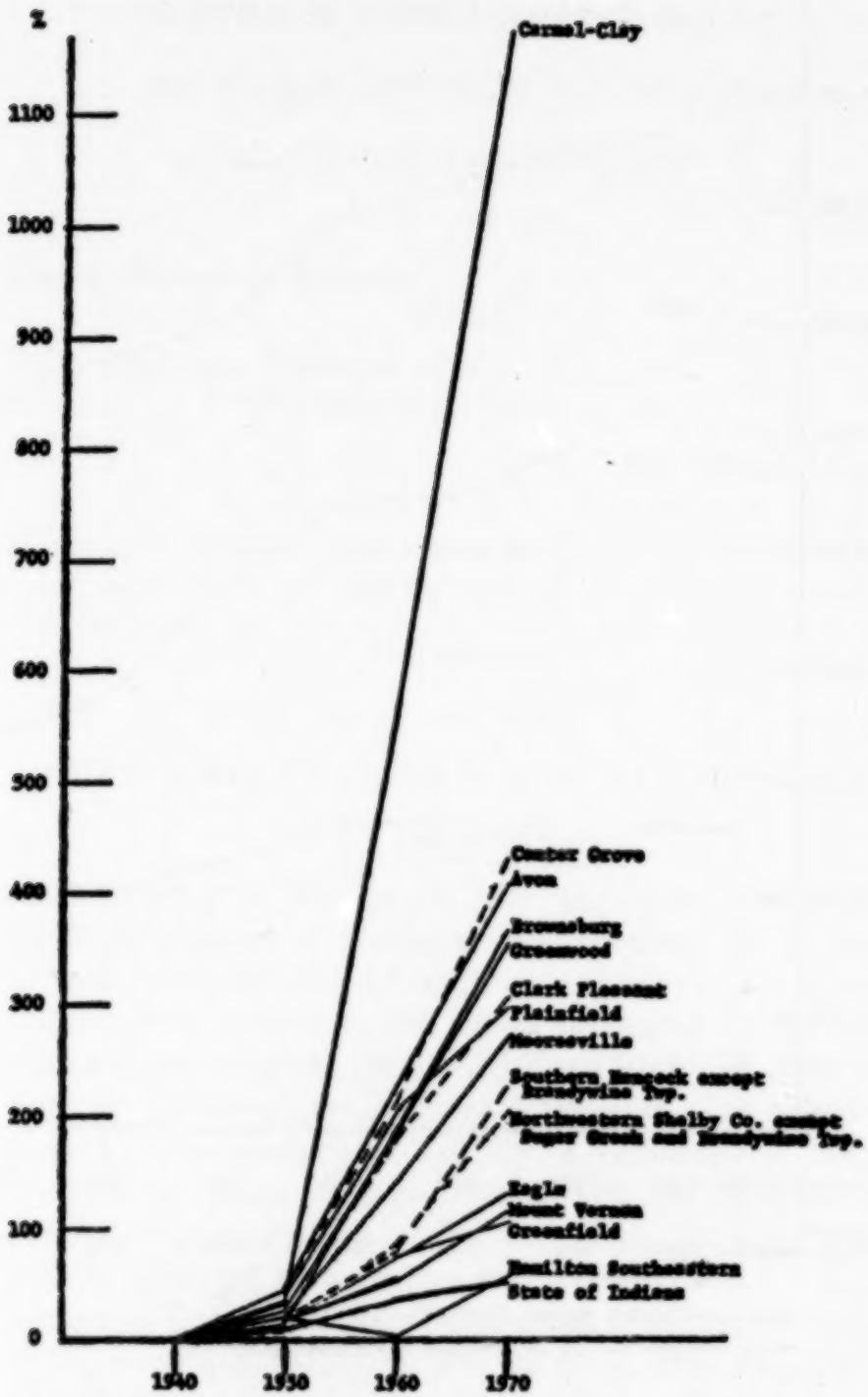


Fig. 10



Percent Increase in Population: Outside Marion County School Districts

Fig. 11

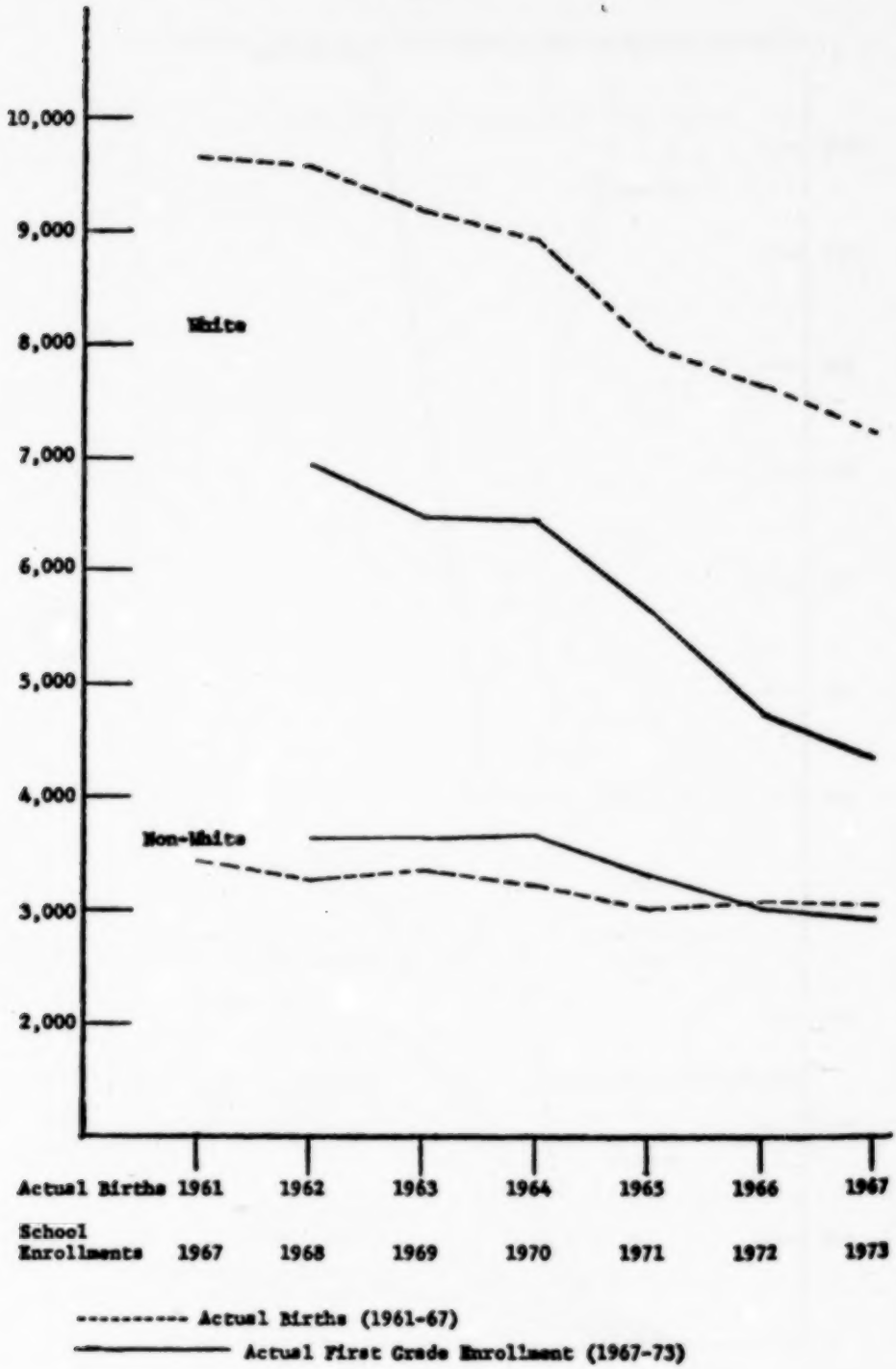

10,000
9,000
8,000
7,000
6,000
5,000
4,000
3,000
2,000
White
Non-White
Actual Births 1961 1962 1963 1964 1965 1966 1967
School Enrollments 1967 1968 1969 1970 1971 1972 1973
---------- Actual Births (1961-67)
———— Actual First Grade Enrollment (1967-73)

Fig. 12

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* DONNY BRURELL BUCKLEY, et al., *Intervening Plaintiffs,* v. BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al., *Defendants.*	No. IP 68-C-225

SUPPLEMENTAL MEMORANDUM OF DECISION

I. *Introduction*

Heretofore, on August 18, 1971, the Court filed herein its Memorandum of Decision, incorporating its findings of fact and conclusion of law, and making certain interim orders, with respect to the issues presented by the complaint of the original plaintiff, United States of America, and the answer of the original defendants, The Board of School Commissioners of the City of Indianapolis, the individual members of such Board, and the Board's appointed Superintendent of schools. Such decision, which will be referred to hereafter as "*Indianapolis I,*" is reported in D.C., 332 F.Supp. 655, aff'd, 474 F.2d 81 (7 Cir. 1973), cert. den., 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041 (1973).

Thereafter, on July 20, 1973, the Court filed herein a second Memorandum of Decision, incorporating its findings of fact and conclusions of law, and making certain interim orders, with respect to certain issues presented by the complaint of the original and added plaintiffs, Donny Brurell Buckley, et al. and the answers of the original and added defendants. Such decision will be referred to hereafter as *"Indianapolis II,"* is reported ante, p. 1191, 37 Ind.Dec. 524, and is now on appeal to the Court of Appeals for the Seventh Circuit, Nos. 73-1968 to 73-1984, incl.

The key decision made in *Indianapolis I* was that the Indianapolis public school system (hereafter "IPS") was being operated by the original defendants, and had been operated by their predecessors in office, as a system practicing *de jure* segregation of students of the Negro race. It was therefore held that the Negro students were being denied the equal protection of the laws, as guaranteed by the Fourteenth Amendment. Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Certain interim measures tending to prevent further segregation were ordered, pending consideration of the questions to be presented and later decided in *Indianapolis II,* it being understood that the law required the defendants to take affirmative action to desegregate IPS. Green v. County School Board, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

The key decisions made in *Indianapolis II* were that (1) as a practical matter, desegregation promising a reasonable degree of permanence could not be accomplished within the present boundaries of IPS, and (2) added defendant officials of the State of Indiana, their predecessors in office, the added defendant The Indiana State

Board of Education, and the State itself have, by various acts and omissions, promoted segregation and inhibited desegregation with IPS, so that the State, as the agency ultimately charged under Indiana law with the operation of the public schools, has an affirmative duty to desegregate IPS.

The Court also held in *Indianapolis II* that IPS could be effectively desegregated either by combining its territory with that of all or part of the territory served by certain added defendant school corporations, into a metropolitan system or systems, and then reassigning pupils within the expanded system or systems thus created, or by transferring Negro students from IPS to added defendant school corporations, either on a one-way or an exchange basis. It further held that the State, through its General Assembly, should be first afforded the opportunity to select its own plan, but that if it failed to do so within a reasonable time, the Court would have the power and the duty to promulgate its own plan, and place it in effect. Bradley et al. v. Milliken et al, 484 F.2d 215 (6 Cir. 1973). See Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

By way of affirmative relief pending action by the General Assembly, the Court ordered IPS to effect pupil reassignments for the 1973-74 school year sufficient to bring the number of Negro pupils in each of its elementary schools to approximately 15%, which has been accomplished. The Court also directed IPS to transfer to certain added defendant school corporations, and for such corporations to receive and enroll, a number of Negro students equal to 5% of the 1972-73 enrollment of each transferee school, with certain exceptions. This order was, on August

8, 1973, stayed by the Court until the 1973-74 school year by an order made in open court but not previously reduced to writing.

At this time, certain matters have been presented to the Court, both formally and informally, which require further rulings in the premises. Such rulings are now made, as hereafter set out, as supplementary to or, in some instances, in lieu of rulings heretofore entered in *Indianapolis II*, as heretofore modified.

II. *The Question of a "Reasonable Time" for State Action*

[15] As stated, it was the Court's conclusion that the State should be afforded the opportunity, for a reasonable period of time, to discharge its affirmative duty to desegregate IPS. The question has arisen as to how long a time is reasonable.

As he Court knew judicially at the time it entered its decision in *Indianapolis II*, the General Assembly was scheduled to organize in November, 1973, for a session to begin in early January, 1974. It has so organized, and numerous bills have already been introduced—none, to the Court's knowledge, having to do with the subject at hand. As the Court also knows judicially, various legislative leaders have publicly announced that the coming session is expected to be short, and targeted for conclusion within a matter of a month or so.

Under the circumstances, considering the urgency of the problem presented, the fact that members of the General Assembly have had since July 20, 1973 to consider the problem, and the anticipated length of the coming legislative session, the Court considers a reasonable time within which the General Assembly should act to be the end of

its January, 1974 session or February 15, 1974, whichever date is sooner. The Court also considers that any legislation adopted by the General Assembly on the subject of the desegregation of IPS should be effective for the 1974-75 school year.

III. *The Duty of the General Assembly*

In its opinion in *Indianapolis II*, the Court pointed out in section IV thereof that the ultimate responsibility for the operation of all public schools in Indiana lies in the General Assembly, and that it has the undoubted power to desegregate IPS by appropriate legislation, citing the Indiana Constitution and some twenty cases decided by the Indiana Supreme and Appellate Courts. It also held that it was the General Assembly's duty to do so, based upon its findings from the evidence that it is not possible for the IPS School Commissioners to bring about a lasting desegregation within IPS boundaries.

[16] In reviewing that opinion, it now occurs to the Court that it perhaps placed undue stress on the General Assembly's power, and not enough on its duty; this failure of direction on the part of the Court may account for the General Assembly's seeming lack of attention to the problem to date, as the Court has no reason to doubt that the able members of that body will do their sworn duty to support the Constitution, once that duty is more clearly defined. By "sworn duty," the Court of course refers to the oath taken by each member of the General Assembly pursuant to Article 6, Clause 3 of the Constitution of the United States, which reads, in applicable part, as follows:

> "... (T)he Members of the several state Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be

bound by Oath or Affirmation, to support this Constitution;..."

As to what duty entails, in this instance, may be best ascertained by the guidelines laid down by the Supreme Court of the United States, whose decision and interpretations of the Constitution are final and binding on all citizens, including elected and appointed public officials, unless thereafter changed by that Court or by Constitutional amendment. Marbury v. Madison (U.S.) 1 Cranch 137, 2 L.Ed. 60 (1803). It is such guidelines which this Court has endeavored to follow to date in this rather difficult case—not because of any personal views of the Court, but for the simple reason that they constitute the law of the land, in every State and Territory, and the Court, pursuant to its own oath, may do no less. These guidelines, expressed in direct quotation from significant opinions of the Supreme Court, are as follows:

> "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does....
>
> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place ... Plaintiffs ... are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. ..." Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (Brown I)
>
> "... (T)he courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance

areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. . . ." Brown v. Board of Education of Topeka, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (Brown II)

". . . (T)he members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State. . .

• • • • •

"Article 6 of the Constitution makes the Constitution the 'Supreme Law of the Land.' . . . (T)he federal judiciary is supreme in the exposition of the law of the Constitution. . . . It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown Case is the supreme law of the land, and Art. 6 of the Constitution makes it of binding effect on the States " 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. 6, cl. 3, 'to support this Constitution.' . . . No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. . . ." Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5, 19 (1958)

"Delays in desegregating school systems are no longer tolerable." Bradley v. School Board of Richmond, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 (1965)

"The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.

• • • • •

"The obligation of the district courts . . . is to assess the effectiveness of a proposed plan in achieving de-

segregation. . . . The matter must be assessed in light of the circumstances present and the options available in each instance.

• • • • •

"'"Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. . . . (I)f it fails to undo segregation, other means must be used to achieve this end.'" Green v. County School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

"We do not hold that 'free transfer' can have no place in a desegregation plan. But like 'freedom of choice,' if it cannot be shown that such a plan will further rather than delay conversion to a unitary, non-racial, nondiscriminatory school system, it must be held unacceptable." Monroe v. Board of Commissioners, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968)

"Nearly 17 years ago this Court held, in explicit terms, that State-imposed segregation by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings.

• • • • •

"The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. . . .

"If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

• • • • •

"The school authorities argue that the equity powers of federal district courts have been limited by Title

IV of the Civil Rights Act of 1964, 42 USC § 2000c. The language and the history of Title IV shows that it was enacted not to limit but to define the role of the Federal Government in the implementation of the Brown I decision. . . .

• • • • •

". . . The proviso in § 2000c-6 is in terms designed to foreclose any interpretation of the Act as expanding the *existing* powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers. . . .

• • • • •

". . . Bus transportation has been an integral part of the public education system for years. . . . Eighteen million of the Nation's public school children . . . were transported to their schools by bus in 1969-70 in all parts of the country.

". . . The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.

"Thus the remedial techniques used in the District Court's order [pairing, busing, etc.] were [well] within that court's power to provide equitable relief. . . ." Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 1971)

"As we have held, 'neighborhood school zoning' . . . is not the only constitutionally permissible remedy; nor it is per se adequate to meet the remedial responsibilities of local boards. Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. A district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiquous and noncontiguous attendance zones. . . .

The measure of any desegregation plan is its effectiveness.

"On the record before us, it is clear that . . . inadequate consideration was given to the use of bus transportation and split zoning. . . ." Davis v. Board of School Commrs., 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971).

"Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfilment of their constitutional obligation to eliminate dual school systems.

"Similarly, the flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. . . . (T)he Constitution does not compel any particular degree of racial balance or mixing but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy. . . .

"We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, 'or for the purpose of creating a balance or ratio,' will similarly hamper the ability of local authorities to effectively remedy constitutional violations. . . . (B)us transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it." North Carolina Bd. of Ed. v. Swann, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971)

IV. *Guidelines of this Court—General*

[17] It is, of course, recognized by the Court that it cannot issue a positive order to the General Assembly to enact specific legislation. It is for such reason that the Court has suggested several different methods by which the General Assembly could approach the problem of effectively desegregating IPS, and it does not imply that there may not be other equally effective methods which may occur to that body.

Within the contest of what has been suggested as possible alternatives, however, the Court offers further observations, as follows:

(1) With respect to the concept of one metropolitan school district, embracing the area designated in Figure 1, attached to the Court's opinion in *Indianapolis II*, it is apparent that some advantages would be obtained from such a system. To name a few, a uniform tax base would be provided for the education of the more than 200,000 pupils in the combined system, and economy in operation could be achieved through central purchasing and reduction of administrative overhead. Complete desegregation would be simplified. On the other hand, it may be that such a system would be too large in terms of difficulty of administration and remoteness of the central office from school patrons.

(2) With respect to the concept of creating various new metropolitan districts—for example, six or eight to replace the present twenty-four pictured on Figure 1, it is apparent that some of the advantages above noted would be reduced, and some of the disadvantages improved. Another alternate, of course, would be to create one metropolitan system for taxing purposes, which in turn would be subdivided into several semi-autonomous local districts.

So long as IPS and the local districts are each effectively desegregated, the method used would be constitutionally immaterial.

[18] (3) With respect to the concept of permitting the present school corporations shown on said Figure 1 to remain as is, insofar as geography and control is concerned, such a solution would of course preserve local autonomy, and this Court would have no reason to disapprove such a solution, so long as each such corporation is required to participate in the desegregation of IPS. Put in other terms, local autonomy for such corporations is, under the law of Indiana, a privilege—not a right—all as discussed in detail in *Indianapolis II*. The consideration for permitting the various corporations to continue their separate existences might therefore be stated to be their participation in a meaningful plan to desegregate IPS. Some of the pertinent facts which the General Assembly may wish to consider in this regard are set out in the next two sections hereof.

V. *Transfer of Pupils*

When speaking of the transfer of pupils, the first logical question is as to the numbers involved. In this connection, the focus must be on the elementary schools within IPS which were not affected by the interim plan adopted by the Court for the present school year, and which have an enrollment of Negro pupils exceeding 80%. There are nineteen such schools, fourteen of which have Negro enrollments in excess of 97%. Two additional schools have enrollments exceeding 60%, and should also be considered. The total enrollment of black students in these 21 schools, excluding kindergarten and special education students, is approximately 11,500.

The General Assembly might order the exchange of all or a substantial part of these 11,500 students with students from the suburban school corporations. For purposes of illustration, if it were determined to desegregate such schools on the basis of approximately 85% white—15% black, then about 9,775 black children would need to be transferred to suburban schools, and about the same number of non-black children would need to be transferred to IPS.

There is case law to the effect that transfers of students must be made on an approximately equal basis insofar as the races are concerned, unless there is good reason why this should not be done. In such cases it has been held that to impose the "burden" of being transported wholly or largely upon students of one race is yet another form of racial discrimination and in violation of the Fourteenth Amendment rights of the group transported. United States v. Texas Education Agency, 467 F.2d 848 (5 Cir. 1972); Lee v. Macon County Board of Education, 448 F.2d 746 (5 Cir. 1971); Haney v. County, Board of Education of Sevier County, 429 F.2d 364 (8 Cir. 1970). Such cases, if followed, would seem to mandate so-called "two-way" busing, absent compelling reasons to the contrary.

The Supreme Court has not specifically addressed itself to this question. However, it is worthy of note that in McDaniel v. Barresi, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971), that Court approved a desegregation plan adopted by the Clarke County (Ga.) Board of Education which reassigned pupils in five heavily Negro "'pockets'" to other attendance zones, busing many of them without any corresponding busing of whites. Other "one-way" busing plans have likewise been approved, depending on the factual setting. Hart v. County School Board, 459

F.2d 981 (4 Cir. 1972); Norwalk Core v. Norwalk Board of Education, 423 F.2d 121 (2 Cir. 1970). Indeed, the Fourth Circuit has flatly held that a pattern of assigning Negro students to formerly all-white schools, without requiring similar travel on the part of whites, does not violate the equal protection clause of the Fourteenth Amendment, Allen v. Asheville City Board of Education, 434 F.2d 902 (4 Cir. 1970). Moreover, analysis of the cases cited in the preceding paragraph indicates they have been decided on their particular facts, even though some of the language is in terms of absolute requirements.

The Court does not find it necessary to attempt to resolve this question in terms of constitutional absolutes, nor could it appropriately do so on the present record, since the question has not been squarely presented. However, the record does contain undisputed evidence that virtually all of the twenty-one IPS elementary schools above referred to (located as shown on Figure 13, attached) are substantially out of line with the requirements of present Indiana law and regulations establishing minimum acreage requirements for elementary schools. The regulations require seven acres for schools with 200 or less pupils, plus an additional acre for each additional 100 pupils or major fraction thereof. Burns' Indiana Rules & Regs., § (28-415)-3. As reflected in Figure 14, attached only one of these schools meets acreage requirements. Most schools are grossly deficient in the space required—for example, the pupil density at School 66 is 544.21 pupils per acre, and is 493.57 per acre at School 42 and 481.33 per acre at School 73. By way of comparison, the pupil density at School 42, taking into consideration its enrollment and the State formula, should be 57.58 pupils per acre. It is thus overcrowded by 857.18%!

The evidence further shows that, with a few exceptions, the twenty-one schools in question are among the older schools in the IPS system—some dating back 100 years, more or less. Although there is no evidence that the Board of School Commissioners has not maintained such schools as well as could be expected under the circumstances, it is a fair inference, subject to further proof, that the type of construction, use of flammable materials, etc., would fail by a wide margin to meet safety standards for newly constructed schools. On the other hand, the evidence discloses that the school plants maintained by added defendant school corporations are, for the most part, relatively new and in compliance with acreage and safety standards.

[19] On the basis of the foregoing facts, therefore, this Court would not feel justified in condemning out of hand a "one-way" suburban busing plan involving pupils from such of the twenty-one schools as may seem to the Board, on analysis, to afford inadequate educational plant facilities, viewed in the light of current standards. Additionally, such a plan would involve transportation of substantially fewer pupils, and therefore be less expensive.

Finally, unless convinced to the contrary by additional evidence in an appropriate hearing, this Court is not prepared to characterize busing as an unmitigated "burden." Although it might appear to a child to be "burdensome" to be derived of walking to school in the warm days of May and September (which presupposes that children do not like to ride in motor vehicles with their neighborhood friends—a somewhat novel concept to the Court), the Court doubts that it would seem such a burden to be transported in a heated bus through the rain, sleet, and snow so familiar in this latitude during other months of the school term. As pointed out in *Indianapolis II*, nearly 80%

of suburban pupils (more than 80% since the elimination of Greenfield) are bused to school at the present time, without complaint.

[20] The Court is not of the opinion that it would be wise to require transportation of kindergarten pupils, primarily because of their age, nor to transport special education pupils because of the various special problems which would inevitably arise in this regard. Further, the Court recognizes that special problems arise with respect to high school pupils, which might render their transfer counterproductive once their high school training has begun. As to pupils in grades 1-8, however, the Court knows of no reason why transfer of pupils, in whatever fashion the General Assembly may elect, would not be reasonable and practical to accomplish the constitutional duty imposed by the Supreme Court, with the understanding, of course, that a transferred elementary pupil would thereafter routinely continue to be transferred to the same transferee school corporation for continued education through high school.

If, for example, transfers were made of Negro pupils from those of the twenty-one schools failing to meet modern standards to the schools of added defendants situate within the geographical area depicted in said Figure 1, all of those transferred would be afforded education in a desegregated setting. It should be no great task to desegregate the remaining school or schools within IPS. The Court estimates, based on the statistics and projections in the record, that it would be necessary for the suburban schools within such Figure 1 area, excluding the Washington Township and Pike Township schools, to accept transfer of IPS elementary pupils in grades 1-8 in number equivalent to approximately 15% of their 1973-74 enrollments in the same grades in order to accomplish this result.

After such transfers were accomplished, the racial percentages in each school to which transfers were made would be approximately 87% white and 13% Negro—a ratio which, by coincidence, would approximate that of the nation as a whole. As regards Washington Township, its minority percentage as projected for the present school year is already this high, so that general 1-8 transfers to this defendant would not appear to be indicated; however, the acceptance of pupil initiated transfers from IPS to its Everett J. Light Industrial Center, to the extent that vacancies exist, might well be required. Pike Township likewise has a substantial minority percentage at this time; however, a number of transfers sufficient to increase such percentage to a figure approximating that of the other suburban schools should be considered.

VI. *Costs and Mechanics of Transfers*

One advantage of the dual transfer system would be that if approximately equal numbers of pupils were transferred to and from suburban schools, tuition, transportation, and other costs would balance out as between IPS and the various other corporations, and no additions to school plants would be necessary. On the other hand, more pupils would be transported, thus increasing this total cost, and such a system would continue the use of the IPS antique buildings and grounds.

[21] A one-way transfer plan would involve substantial tuition payments from IPS to the transferee schools. To the extent that such tuition applied only to the actual per capita cost of instruction, utilities, maintenance service, etc., no hardship would be imposed upon IPS, because it is apparent that IPS expense for such services would be correspondingly reduced. However, the present

transfer law, IC 1971, 20-8.1-6-1 through 20-8.1-6-15, as amended, Burns' §§ 28-5001 through 28-5015, also contemplates charges related to the fair value of the transferee school plant, tax levies for building purposes, and other items related to capital outlay of the transferee school. Considering that the State of Indiana is itself at fault in this matter, as previously found, the General Assembly should consider whether the State should be required to contribute the necessary amount to compensate the transferee corporations for the use of their respective plants. Such a provision, with an appropriate formula, could be adopted as an amendment to the existing transfer law.

It is possible that the General Assembly could discharge its duty in this matter simply by amending the existing transfer law. The purpose of such law, as the Court understands it, is to permit the better accommodation of school children. As pointed out in Section III hereof, the Supreme Court of the United States has held that for a minority child to be compelled to attend a segregated school denies the Fourteenth Amendment rights of such child: in effect, the child is not properly accommodated. Therefore, if the transfer law were amended to recognize transfers to accomplish desegregation of a school system which has been finally adjudged to have been segregated *de jure* (as is true in the case of IPS), a basis would be established for other necessary changes regarding time of payment of tuition, the share to be borne by the State, the matter of responsibility for and payment of the cost of transportation, and similar details. Since the actual number or percentage of pupils to be transferred is more of an administrative detail than a legislative function, this matter could be left to the discretion of the local school board or boards, subject to the approval of the court having jurisdiction of the case.

VII. *Vacation of Certain Previous Orders*

The various orders contained in *Indianapolis II*, and heretofore stayed by the Court, requiring certain transfers of pupils from IPS to added defendants are each vacated and set aside. It should be understood, however, that the reason for this ruling is simply that it would be inconsistent to permit such orders to stand, although stayed, inasmuch as the General Assembly, in the exercise of its discretion, may desire to adopt an acceptable plan which would be inconsistent with such orders.

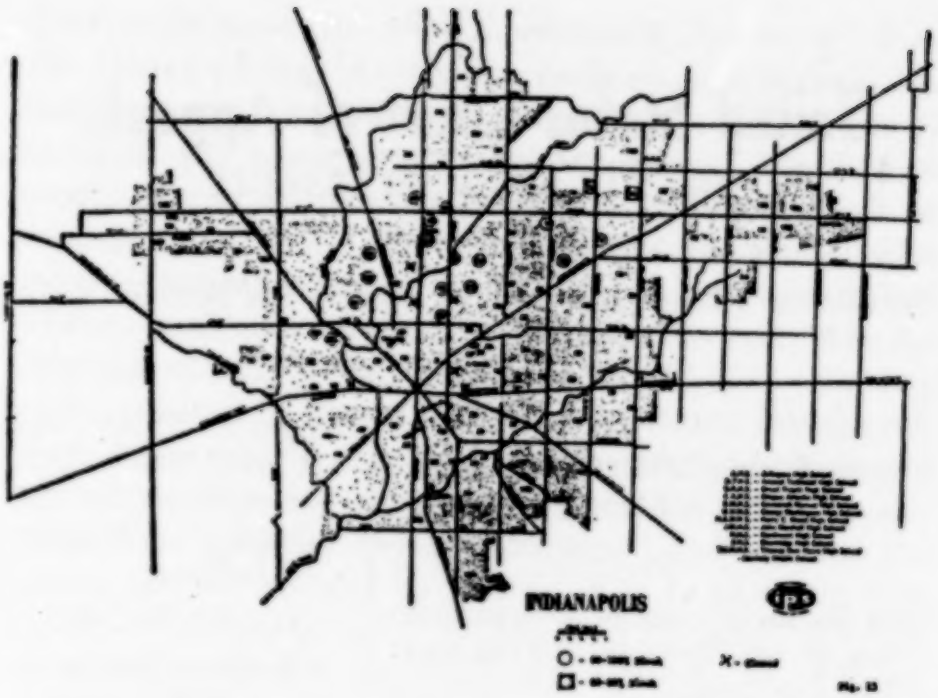
Moreover, the 5% order contained in *Indianapolis II* was designated as a mere interim order, it having been the Court's opinion that such amount of transfers would have been the most which could reasonably be expected to be accomplished within the limited time between the date of the order and the beginning of the 1973-74 school term. As it happened, added defendants were able to convince the Court that even this limited relief could not be accomplished within the time available, hence the stay. At this time the Court looks forward to a permanent solution to the problem of desegregating IPS, which will either come from the General Assembly, as it should, or from this Court in the event of legislative default. From what has been said herein, it should be apparent that the Court does not at this time consider 5% transfers as an adequate permanent solution. Indeed, if the solution is handed back to the Court by default, additional scrutiny will necessarily be given to complete consolidation along metropolitan lines.

[22] However, by vacating its previous orders, it is not the intention of the Court to render moot the appeals now being prosecuted by added defendants. To the contrary, the Court is of the opinion that its conclusions of

law as contained in *Indianapolis II,* as modified and supplemented herein, regarding the duty of the State to desegregate IPS, the State's power to adopt a metropolitan plan or transfer plan for such purpose, and the duty of the Court to promulgate such a plan in default of State action within the time presented, all involve controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from such rulings will materially advance the ultimate termination of this litigation. It is therefore respectfully suggested that the Court of Appeals determine said appeals on the merits, as provided in 28 U.S.C. § 1292(b).

Further, the Court in its previous order of July 20, 1973, *Indianapolis II,* entered the following: "All defendants who have not done so are directed to institute appropriate in-service training courses for their respective faculties and staff, and otherwise to orient their thinking and those of their pupils toward alleviating the problems of segregation." This order was not, and is not stayed, and neither is it vacated. It therefore remains as a continuing and final order, operating against added defendant school corporations, and accordingly does not appear to be moot.

[See following illustration]



A	B	C	D	E	F	G
1	853	3.4	14	250.88	60.92	411.81
27	945	1.75	13	482.85	65.00	742.84
41	1157	3.0	17	385.66	68.05	566.73
42	691	1.4	12	493.57	57.58	857.18
43	811	2.6	13	311.92	62.38	500.03
44	1036	3.5	15	296.00	69.06	428.61
45	884	2.5	14	353.60	63.14	560.02
48	589	3.6	11	163.61	53.54	305.58
53	1068	10.0	16	106.80	66.75	160.00
56	655	1.7	12	385.29	54.58	705.91
60 **	1152	2.9	17	397.24	67.76	586.24
63	383	1.5	9	255.33	42.55	600.07
66	1034	1.9	15	544.21	68.93	789.51
71	1274	8.2	18	155.36	70.77	219.52
73	1083	2.25	16	481.33	67.68	711.18
75	793	1.75	13	453.14	61.00	742.85
76	594	1.5	11	396.00	54.00	733.33
83	496	11.0	10	45.09	49.60	-9.10
110	1296	10.6	18	122.26	72.00	194.26
Ken.*	552	1.5	11	368.00	50.18	733.35

** School 60 and Mapleton-Fall Creek School

* Kennedy Middle School

A—Elementary Schools

B—September 1972 Enrollment

C—Acreage of School Site

D—Minimum State Required Acreage

E—Pupils Per Actual Acre

F—Pupils Per Minimum Required Acre

G—Percent Overcrowded

Fig. 14

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1972 — SEPTEMBER SESSION, 1972

No. 72-1031

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana.

No. IP 68-C-225

S. HUGH DILLIN
Judge.

ARGUED SEPTEMBER 13, 1972—DECIDED FEBRUARY 1, 1973

Before KNOCH, *Senior Circuit Judge,* FAIRCHILD and PELL, *Circuit Judges.*

PELL, *Circuit Judge.* This is an appeal from an order[1] by the district court finding that the Board of School Commissioners for the School City of Indianapolis, Indiana ("School City")[2] had been following a course of *de jure* segregation in violation of the holding of the Supreme

[1] The district court's Memorandum of Decision is set out in full as *United States v. Board of School Commissioners of City of Indianapolis, Indiana,* 332 F. Supp. 655 (S.D. Ind. 1971).

[2] The district court noted at 332 F. Supp. at 675-76 that by special act of the Indiana legislature the School City of Indianapolis is no longer coterminous with the civil or corporate city of Indianapolis. We draw no inferences from this fact.

Court in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) *(Brown I)*. On the basis of this finding, the district court determined as a conclusion of law that it had authority to convert to a unitary system.[2] The district court, as trier of fact, made detailed findings of fact to support the ultimate finding of *de jure* segregation and we shall not attempt to recapitulate those findings, except where specifically required. We do note however, that the court specifically found that (1) on May 17, 1954 (the date of the decision in *Brown I*), the School Board was operating a dual school system, that is, it was found to have had a "deliberate policy of segregating minority (Negro) students from majority (white) students," and (2) that the Board had not changed its policies so as to eliminate such *de jure* segregation on or before May 31, 1968 (the date on which the Government filed its complaint), 332 F.Supp. at 658.

Before turning to appellants' contentions, we first enunciate a few general principles on which the opinion of this court is based. In order to support a finding of *de jure* segregation, it is not necessary that there be a complete separation of the races. Certainly school systems totally segregated by force of a state law have been found to violate *Brown I*, but other districts in such segregation has been only partially effective (that is, in which there are some integrated schools) have been held to be equally in violation. *See Davis v. School District of City of Pontiac, Inc.*, 309 F. Supp. 734, 740 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir. 1971); *United States v. Board of Education, Independent School District No. 1, Tulsa County,*

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[2] The district court ordered interim relief and pursuant to *Brown v. Board of Education of Topeka*, 349 U.S. 294 (*Brown II*), retained jurisdiction to order further relief. In its brief, the School City questioned the specific interim relief regarding the Forest Manor Middle School, but that controversy was settled prior to oral argument.

Oklahoma, 429 F.2d 1253 (10th Cir. 1970). Further, the actions of the Board of School Commissioners and its duly-appointed representatives and agents may be sufficient to constitute *de jure* segregation without being based on a state law, or even if they are in derogation of state law forbidding segregation.[4] *See Keys v. School District No. 1, Denver, Colorado,* 445 F.2d 990 (10th Cir. 1971), *cert. granted,* 404 U.S. 1036 (1972); *Bradley v. Milliken,* —— F.2d —— (6th Cir., filed Dec. 8, 1972) (slip op. at p. 49-50).

Another principle which comes into play in examining the district court's opinion relates to the affirmative duty placed on a school board "to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. County School Board of New Kent County,* 391 U.S. 430, 437-38 (1968). This affirmative duty attaches to any school system guilty of *de jure* segregation at the date it became illegal under *Brown I,* May 17, 1954. Thus, we reject the distinction, proposed in the district court by the *amicus curiae,* between violation (initial, *e.g., Brown I*) cases and remedial (enforcement, *e.g., Brown* II) cases, for a court in a remedial case when it is considering what remedy to order looks to the same factors as it did when it determined that there was a violation of the mandate of *Brown I.* A school board, after years of *de jure* segregation, cannot blithely say that it has become "color blind" the day before a suit is filed and thereby avoid liability. As the Supreme Court recognized in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 18 (1971), not all "invidious racial distinctions" are

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[4] In 1949, the Indiana General Assembly passed an Act requiring desegregation on a phased basis, ending the official State policy of segregation, Acts 1949, ch. 186, p. 603; Burns Ind. Stat. Ann. §§ 28-6106 to 28-6112 (1970).

readily eliminated. It is in this sense clear that factors viewed as being reflective of *de jure* segregation in remedial cases would be similarly significant in the initial determination of whether or not there has been a violation of constitutional rights. It is in this way that remedial cases are relevant to the present case.

On this appeal, defendants basically present two arguments: first, that the district court erred as a matter of law in basing its finding of *de jure* segregation on the evidence of mere racial imbalance in the schools, and second, that the district court's finding that segregation resulted from the School Board's actions, and therefore was *de jure,* was clearly erroneous. Although the first point might appear to be subsumed in the second, there is a distinction between the two as the second assumes, *arguendo,* that the district court did not make the mistake claimed in the first point.

Appellants first assert that there is no constitutional duty to remedy the effects of racial imbalance or to maintain any particular racial balance in the public schools. The Government does not quarrel with this assertion, and, indeed, insofar as it relates to purely *de facto* segregation, *unaided by any state action,* it is the law of this circuit *Bell v. School City of Gary, Indiana,* 324 F.2d 209 (7th Cir. 1963), *aff'g* 213 F.Supp. 819 (N.D. Ind. 1963). The Board contends that since no student since *Brown I* has ever been compelled to go to a school because of his race nor denied admission to a school because of race, the racial imbalance presented in the record cannot support a finding of *de jure* segregation. In sum, appellants seek to portray this case as one of *de facto* segregation only, and argue that there is no duty to alleviate such racial imbalance which the Board did not cause. *Deal v. Cincinnati Board*

of Education, 369 F.2d 55 (6th Cir. 1966); *Bell v. School City of Gary, supra.*

The difficulty with this line of reasoning is that it does not comport with the findings of fact of the district court. As Judge Kiley has said for this court,

> "The weakness in this argument is that the district court did not find that defendants inherited an innocent de facto segregation situation, but found that they inherited from their predecessors a discriminatorily segregated school system which defendants subsequently fortified by affirmative and purposeful policies and practices which effectually rendered de jure the formerly extant de facto segregation. . . . This is not a case of mere 'inaction' under the court's finding of the unlawful actions of the Board." *United States v. School District 151 of Cook County, Illinois*, 401 F.2d 1125, 1131 (7th Cir. 1968).

The present case—in which, as will be discussed below, the district court found gerrymandering of districts, segregation of faculty, and other indicia of a dual system—stands in marked contrast to the *Deal* and *Bell* cases, above, where the district courts made specific findings of no such discriminatory practices by the boards.[5] Similarly, the present case is unlike *Banks v. Muncie Community Schools*, 433 F.2d 292 (7th Cir. 1970), where the court remarked that the record failed to disclose evidence of either racial motivation in board policies or a history of racial segregation from which such motivation might be inferred. Here, the district court commented extensively on both aspects in its opinion.

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[5] In *Bell*, there was a specific finding that there was no change in the school district boundary lines, and thus no gerrymandering. Also in *Bell* there were examples of black students being transferred from predominantly black schools to predominantly white schools to relieve overcrowding.

But appellants point to the language in the Supreme Court's opinion in *Swann, supra,* 402 U.S. at 24-25, which states that a particular racial balance is not necessary in each school and that one-race schools may be acceptable. They extrapolate from this that, since the only evidence before the trial judge was that of racial imabalance, the holding must be clearly erroneous, Rule 52(a), Fed. R. Civ.P. Our review of the record and the district court's opinion convinces us that this contention cannot be sustained. What the district court's opinion relates is a pattern of decision-making which it determined reflected a successful plan for *de jure* segregation. Although it might not be possible to infer the requisite discriminatory intent from any one instance or example in the record, it is clear that the district court found a purposeful pattern of racial discrimination based on the aggregate of many decisions of the Board and its agents. See *Davis v. School District of the City of Pontiac, Inc.,* 443 F.2d 573, 576, (6th Cir. 1971).

The appellants deny any conscious motivation on the part of their predecessors or themselves to foster, or even continue, segregation policies in the school system; however, in examining that which was in existence at the time of *Brown I* and that which transpired thereafter, the courts are not precluded from drawing the normal inference of intent from consciously consummated acts. Intent, in this sense, may or may not be consistent with expressed motivation.

There is no doubt that the statistics as to the extreme racial imbalance in various schools, especially those schools previously segregated by state law until 1949, was one of the factors which the district judge considered. But even though no particular racial balance is *per se* neces-

sary, *Swann* does not say that such imbalance may not be considered as one factor from which the district court may infer a segregatory intent.

Inasmuch as our review of the district court's order, as discussed hereinafter, reflects that the racial imbalance was only one factor considered by the district court, we reject appellants' first contention that the finding of *de jure* segregation was based merely on evidence of racial imbalance.

The Board also rests its case on the alleged mistake of the district court in inferring *de jure* segregation from various acts which encouraged racial imbalance in the schools. It argues that these underlying findings of fact are clearly erroneous insofar as they place the blame for the present system's racial imbalance on actions taken by the Board and its agents. To show *de jure* segregation, rather than *de facto* segregation, the Government must show improper intent and causation. Throughout the trial and in its brief in this court, the Board emphasized not only its lack of intent, but also that the schools which are predominantly or completely black would have become so no matter what the Board did as long as it maintained some policy approximating that of a neighborhood school system. It is to these contentions that we now turn.

Initially, we must consider appellants' contention that they have adhered nondiscriminatorily to a policy of neighborhood schools. We are, of course, limited by the fact that we can only set aside the district court's findings if they are clearly erroneous, Rule 52(a), Fed. R. Civ. P., and cannot substitute our "findings" for those of the district court, *Northcross v. Board of Education of the Memphis, Tennessee, City Schools,* 397 U.S. 232, 235 (1970), as requested by appellants in oral argument, even

though much of the record is documentary.[6] We also note that appellants are most strenuous in their denial of any present discriminatory activity, leaving the actions of the 1950's as little more than ancient history with minimal or no probative value for this case. At this point, we need only note that most of the practices and policies discussed below were present in May of 1954 and that the evidence of both segregatory intent and causation is substantial enough to support the district court's findings. Further, as noted above, the fact that the Board's predecessors were guilty of unlawful segregation after *Brown I* does have an impact on the Board's case today. It placed the Board thereafter under an affirmative duty to eliminate all vestiges of the dual system.

The district court made detailed findings regarding a number of practices which it considered supported the ultimate finding of *de jure* segregation. Perhaps the most extensive finding related to gerrymandering of school attendance zones within the allegedly neutral framework of the neighborhood school system. In the Board's initial set of neighborhood boundary lines, the district court found,

> "[they] were drawn with knowledge of racial residential patterns and the housing discrimination underlying it. Not only did the Board not attempt to promote desegregation, but the boundary lines tended to cement in the segregated character of the elementary schools." 332 F. Supp. at 666.

Our examination of the record shows this finding to be supported by substantial evidence. Most characteristic is

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[6] There were over 190 exhibits introduced into evidence by the parties, many with multiple sub-parts. Yet, it would be inaccurate to say that the documentary evidence was all that was involved since the trial lasted several days, with the transcript covering over 2000 pages if three definitions admitted into evidence are included.

the district carved out of School 64 which exactly covers a small enclave of blacks on the southeast side of Indianapolis. That it was easy for the Board to superimpose these geographical limitations on the patterns of residential discrimination discussed by the district court does not make the congruency of housing and school boundaries inevitable. It was just such a use of boundary lines to lock in previous segregation which was, condemned in *United States v. School District 151, supra,* 404 F.2d at 1132, and *United States v. Board of Education, Tulsa County, Okla., supra,* 429 F.2d at 1255 and 1259.

This questionably fortuitious superimposing of boundary lines was highlighted by the district court when it alluded to the inconsistent application of the generally accepted principles for drawing zones for neighborhood schools, thereby increasing racial imbalance, 332 F. Supp. at 666, n.54. Such evidence was considered probative of the existence of a dual school system in *United States v. Board of Education, Tulsa County, Okla., supra,* 429 F.2d at 1256. On the whole, we think that the record is clearly sufficient to support a finding of gerrymandering of school boundary lines. Certainly, we are unable to say that the finding is clearly erroneous. Once again, it is not any one specific change which would allow a court to find such a fact, but the pattern and practice from which the court could infer the impermissible occurrence.[7] *Cf. Downs v. Board of Education of Kansas City,* 336 F.2d 988 (10th Cir. 1964). The district court in the present case rejected similar explanations raised by appellants, at least as to some of the changes, and we cannot say that this finding

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[7] The most graphic example of such gerrymandering is found in the feeder schools chosen to send students to all-black Crispus Attucks High School in 1954, the year *Brown I* was decided, and continued for years thereafter.

is clearly erroneous on the record before us. We agree with the court in *Keyes v. School District No. 1, Denver, Colorado, supra,* 445 F.2d at 999, that "we can perceive no rational explanation why state imposed segregation of the sort condemned in Brown should be distinguished from racial segregation intentionally created and maintained through gerrymandering, building selection and student transfers." See also *United States v. Jefferson County Board of Education,* 372 F.2d 836, 876 (5th Cir. 1966), *aff'd en banc,* 380 F.2d 385 (5th Cir. 1967).

In support of the finding of a policy of gerrymandering school boundaries was the use of optional attendance zones discussed by the district court at 332 F.Supp. at 668. Although the Board asserted a variety of explanations for these optional zones, there is no doubt that its effect was to allow whites in racially mixed neighborhoods to choose to attend a "white" school and blacks to attend a "black" school. There was testimony in the record as to informal practices of encouraging low achievers and problem students who were black to go to all-black Crispus Attucks High School. This practice was identical to one condemned in *Smuck v. Hobson,* 408 F.2d 175, 183 (D.C. Cir. 1969), *aff'g Hobson v. Hansen,* 269 F. Supp. 401 (D.D.C. 1967). Moreover, since the optional attendance zones in the present case were superimposed upon a system with a substantial history of state-enforced segregation, we find particularly applicable those cases which have questioned freedom-of-choice plans as a means for eliminating *de jure* segregation.

In *Green v. County Board of New Kent County, supra,* and *Raney v. Board of Education of the Gould School District,* 391 U.S. 443 (1968), the Supreme Court, although not holding freedom-of-choice plans to be unconstitutional

per se, stressed that they were not always an effective way of desegregating a dual system, and, in fact, might serve only to perpetuate separation of the races by placing the burden for desegregation on the children and their parents rather than on the school board where it belonged. If we follow the Supreme Court's mandate in *Monroe v. Board of Commissioners of the City of Jackson,* 391 U.S. 450 (1968), and look at the effect of the free transfer plan on the school system, then it becomes quite clear that the district court's disapproval of these optional attendance zones was not clearly erroneous.

Further reinforcing the district court's opinion was the stipulated fact that "it had been the general policy and practice of the defendants and their predecessors in office . . . to assign teachers (including substitute teachers) and staff members to schools, . . . so that, in general, the faculty and staff of each school mirrored the racial composition of the school's student body." Such a practice was condemned by the court in *Davis v. School District of the City of Pontiac, Inc., supra,* 443 F.2d at 574 and 576. But more significantly, the practice was impliedly condemned by the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 18: "Independent of school assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." The fact that after the Government initiated this suit the Board of School Commissioners by stipulation agreed to eliminate this policy and assign teachers on a nonracial basis under court supervision will

be discussed hereinafter. At this point, we only note that as of 1968, substantial faculty segregation (to match the student segregation—whether *de jure* or *de facto*) was the admitted policy of the Indianapolis school system.

The district court also referred to Board practice concerning construction of additions to existing schools and temporary transportation of students when there was overcrowding prior to any permanent resolution of a given situation, 332 F. Supp. at 667-668 and 669. Further, the court noted that the construction of new schools fitted into a pattern of promoting racial imbalance and isolation, 332 F.Supp. at 668-669. Once again, the general finding of fact as to intent made by the district court is a permissible inference from the evidence presented by the record. There were several instances cited in which additions were built to adjoining schools of opposite racial makeup rather than building a new school between them which would have had a racially mixed student body. It was a similar pattern of construction of additions to existing schools on which the court relied in part in finding *de jure* segregation in *United States v. Board of Education, Tulsa County, Okla., supra,* 429 F.2d at 1256. In addition, the placement and usage of junior high schools was stressed by the Government in its case in chief. In those examples, certain intermediate grade pupils were put into junior high schools with the pupils coming from elementary feeder schools basically of one race makeup even though another elementary school not used for feeding, containing basically pupils of the opposite race, was as close to the junior high school and often was more overcrowded than the feeder schools.

With respect to the district court's findings on the Board's choice of sites for new schools, of particular inter-

est is the fact that the two newest high schools have been constructed in the furthest extremities of the School City, as far as possible from the center city black areas. Although the construction of schools to service these rapidly developing areas was indeed necessary, their location at the most distant points of the School City apparently was viewed by the district court as one further fact from which it inferred a segregatory intent, an inference which we cannot say is clearly erroneous on the record as a whole. As this court said in *United States v. School District 151, supra,* 404 F.2d at 1133, "it does not follow from the absence of a duty to achieve racial balance that a Board may deliberately select sites to achieve racial segregation." Nor, we will add to the foregoing statement, may a Board deliberately but unnecessarily select sites the obvious result of which is the achievement of racial segregation.

Similarly, the Chief Justice's opinion in *Swann v. Charlotte Mecklenburg Board of Education, supra,* 402 U.S. at 20-21, emphasized that construction of new schools was one of the most potent weapons in maintaining a segregated school system, both by constructing new schools in white suburban areas far from black residential areas, thus allowing racial separation without significant departure from the often enunciated principles of "neighborhood schools," and by promoting further residential segregation by denoting specific areas as white or black. See also *United States v. Jefferson County Board of Education, supra,* 372 F.2d at 876.

From the above, we conclude that the findings of the district court are not clearly erroneous, that, in fact, the factors cited by the judge to support the ultimate finding are relevant and significant considerations, not only in our opinion, but also in the opinions of various courts

which have dealt with similar cases, and that the inference as to the improper intent which the judge drew from the patterns he saw was proper. As to this last point, we can only emphasize that there are very few cases of school segregation today in which the defendants admit that they had an improper intent. Such intent may then be properly inferred from the objective actions. The district court's opinion refers not only to specific examples but also to aggregate findings: for example, the court stated, "according to the evidence, there have been approximately 350 boundary changes in the system since 1954. More than 90% of these promoted segregation." 332 F.Supp. at 670. See *Keyes v. School District No. 1, Denver, Colo., supra,* 445 F.2d at 1000. There is substantial evidence to support the inference.[8]

There is one further contention raised by appellants that we must consider. As noted above, appellants denied both that they had a segregatory intent and that their actions were the proximate cause of the present severe racial imbalance in many of the schools in Indianapolis. The Board argued that whatever patterns of *de jure* segregation existed in the past, today's segregation was *de facto,* if that. Therefore, it is argued, nothing the Board could have done would have prevented such a situation from occurring unless it had rejected the concept of neighborhood schools altogether, something which the courts have not required in the absence of *de jure* segregation. This contention is not easily answered since, as the district court's opinion reflects, other forces both public and private have had significant impact on residential housing

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[8] We note that such inferences are not unique to this area of the law. The doctrine of "conscious parallelism" in antitrust law involves a similar inference of intent from objective factors. See *Antitrust Developments, 1955-1968* at 22-24. See also *Littleton v. Berbling,* No. 71-1395, ... F.2d ... (7th Cir., filed October 6, 1972) (slip op. p. 29).

patterns in Indianapolis. Arguably, *Brown I* and *Brown II* would still reach such conduct even if the result was clearly inevitable. But we can add that in the present case we believe that the district court's finding is not clearly erroneous when it lays at least a substantial part of the blame on defendants and their predecessors and agents. The Supreme Court in *Swann,* as well as many other courts, has recognized that school policy has a substantial impact on residential patterns as well as vice versa. Thus, the appellants are not the victims of the inevitable since their predecessors' actions have contributed in substantial part to the present pattern. Furthermore, even the appellants cannot successfully argue that the marginal cases in racially mixed areas are inevitable. Those schools which might have racially mixed enrollments today but due to the practices found by the district court are either predominantly white or predominantly black are clearly within the Board's responsibility. Finally, it would be improper to allow the Board to follow policies which constantly promote segregation and then defend on the *presumption* of inevitability.

A related consideration is found in appellants' protestations that they have in the last several years taken substantial steps to correct any possible inequities inherited from their predecessors in office. The district court's opinion shows, however, that even after the date the suit was filed, defendants continued in some of the patterns which the court found to be segregatory. Even giving the appellants the benefit of all doubts as to the last few years, we would agree with the court in *Davis v. School District of City of Pontiac, Inc., supra,* 443 F.2d at 575: "However, these same contentions were presented at trial and the District Court, while acknowledging recent efforts to improve the situation, nevertheless found the new policies inadequate

to cure the effects of years of purposeful segregation." Especially as to actions taken after the date on which the suit was filed,[9] as praiseworthy as they may be, such actions go more to the proprietary of granting equitable relief, rather than to the merits of the district court's findings. We might also note that since 1968, when this suit was filed, the Board has rejected a plan of desegregation propounded at the Board's request by a team of educators from the Office of Education, Department of Health, Education and Welfare. Although there was certainly no requirement that the Board accept the proposal, the unqualified rejection of a similar plan was found to be probative of an improper intent in *United States v. School District 151, supra,* 404 F.2d at 1133.

In sum, this case was tried to a judge who obviously gave it considerable conscientious thought and attention and by able counsel on both sides. We have examined the court's findings of fact and are unable to say the findings are clearly erroneous that during much of the period from 1954 to 1968 the Board continued affirmative policies which promoted a dual system, and that last-minute efforts have been totally insufficient to eliminate the consequences of those years of discrimination. Since the district court's findings of fact are not clearly erroneous, and since the court correctly stated the law based on those findings, the judgment of the district court is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

[9] The integration of Crispus Attucks High School, the desegregation of faculty appointments, and the majority to minority tranfer program were adopted only after this suit was filed.

UNITED STATES OF AMERICA, *Plaintiff,* v. THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al., *Defendants.*	United States District Court, S. D. Indiana, Indianapolis Division. No. IP 68-C-225 Aug. 18, 1971.

MEMORANDUM OF DECISION

DILLIN, District Judge.

This action, filed May 31, 1968, was tried by the Court on July 12-21, 1971. The Court has considered the voluminous testimony, the more than 200 exhibits, the post-trial briefs, has taken judicial notice of certain historical facts believed to be matters of common knowledge, and now files its findings of fact and conclusions of law in the form of this memorandum. Rule 52(a), Federal Rules of Civil Procedure.

I. GENERAL

This is a school desegregation action brought by the United States pursuant to Section 407(a) and (b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6(a) and (b). The defendants are The Board of School Commissioners of Indianapolis, Indiana (hereinafter "School Board" or "Board"), the members of the Board, and its appointed Superintendent of Schools.

The defendant School Board is a common school corporation organized and existing under the laws of the State of Indiana. It is situated within Marion County, Indiana, and governs, manages, and controls all of the public elementary and high schools within a geographical area known as the School City of Indianapolis (hereinafter

"School City"), all as required by Indiana law. The shape of the School City resembles that of a trussed fowl, with its head to the north, its bound feet to the south, and its flapping wings extending east and west. The east-west wingspread, at its greatest, is about 16 miles. The north-south dimension of the School City is about 13 miles.

During the 1970-71 school year, the School Board operated 110 elementary schools. The usual (but not invariable) grade structure of the elementary schools was a kindergarten-through-eighth-grade structure. Among these 110 schools were 6 junior high schools. During the 1970-71 school year, two of the elementary schools were devoted entirely to the education of mentally retarded children, and one of the elementary schools was devoted entirely to the education of physically handicapped children and children having both physical and mental handicaps.

During the 1970-71 school year, the School Board operated 11 high schools. With the exceptions hereinafter noted, each of these high schools housed students in grades 9 through 12 who had attended one of the "feeder schools" regularly assigned to the particular high school. The exceptions to these general statements are that Crispus Attucks High School (hereinafter "Crispus Attucks") housed students in grades 10 through 12 only, its 9th grade class having been divided between the newly acquired Cold Spring Campus and Northwest High School (hereinafter "Northwest") and that Shortridge High School (hereinafter "Shortridge") housed a 9th grade made up of students from assigned "feeder schools" and 3 classes of students who were attending Shortridge under "the Shortridge Plan." Also, a comparatively small number of students were transferred to high schools other than those to which originally assigned, pursuant to the transfer policies of the Board.

The total enrollment in the elementary schools at the close of the 1970-71 school year was 77,658 students (excluding special education students). Negro students constituted 37.4% of that total. The total enrollment in the high schools at that time was 22,487 students. Negro students constituted 33.6% of that total. There were approximately 4,379 faculty members, of whom 976 (22%) were Negro.

Of the seven persons currently serving as members of the School Board three are Negroes (Mrs. Cary D. Jacobs, The Reverend Landrum E. Shields, and Mr. Robert D. DeFrantz). Mr. Shields served as President of the School Board from the date of the Board's first meeting in July, 1970, until July 13, 1971, on which latter date Mr. DeFrantz was elected to the Presidency, in which position he presently serves. The Board does not appear to be polarized along racial lines, and the personnel of central administration, operating under the direction of the Superintendent, likewise refects a reasonable racial balance.

On February 6, 1970, an Indiana not-for-profit corporation, Citizens of Indianapolis for Quality Schools, Inc., attempted to intervene herein as a party defendant, asserting that its membership consisted exclusively of parents of students in the Indianapolis public schools who possessed a legally cognizable interest in the proceeding on such account. The motion to intervene was accompanied by petitions executed by some 5,000, more or less, parents who requested such intervention. The petition to intervene was denied by the Court, for the reason that the corporation did not appear to have an interest sufficient to permit intervention as of right pursuant to Rule 24 (a) (2), F.R.C.P. *Hobson v. Hansen,* D.C. Dist., 1968, 269 F.Supp. 401; *Blocker v. Board of Education of Manhasset, New York,* E.D.N.Y., 1964, 229 F.Supp. 714. Permissive inter-

vention was also denied. However, Mr. Harold E. Hutson, attorney for the petitioner, was permitted to appear as amicus curiae, and in such capacity he attended the trial, was furnished with copies of all exhibits, and participated in the argument and post-trial briefing.

II. THE ISSUES

There are but two ultimate factual issues in this case, and two critical dates. The two dates are May 17, 1954, the date of the decision of the Supreme Court of the United States in *Brown v. Board of Education of Topeka ("Brown I")*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 38 A.L.R.2d 1180, and May 31, 1968, the date on which this suit was filed.

Brown I, of course, held that in the field of public education the doctrine of "separate but equal" has no place, and that segregation of children in public schools by operation of law solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprives the children of the minority group of equal educational opportunities and hence of the equal protection of the laws guaranteed by the Fourteenth Amendment. Approximately one year later, in the same case (*"Brown II"*), 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, the Court ordered the District Courts involved in *Brown* and its companion cases "to take such proceedings and enter such orders and decrees • • • as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." It thereupon became the duty of all of the States, operating through their various agents, i.e., boards of school commissioners and the like, such as the defendant Board, to desegregate such school corporations as were practicing *de jure* segregation of their pupils as of May 17, 1954.

The two ultimate issues herein may therefore be stated as follows:

1. Did the School Board operate a dual school system, or, put another way, did it have a deliberate policy of segregating minority (Negro) students from majority (white) students in its schools on May 17, 1954?

2. If the answer to the first question is in the affirmative, had the Board changed its policy so as to eliminate such *de jure* segregation on or before May 31, 1968?

The plaintiff United States of America has the burden of proving the affirmative of the first issue and, if proved, the negative of the second. The defendants deny *de jure* segregation on either of the critical dates, and further urge that a third critical date must be considered: the date of the trial. Their argument in the latter connection is that no matter what may have gone before, if the Board is operating a unitary system as of the date of trial there is no justification for judicial intervention or for the granting of relief in equity.

As will be set out in more detail hereafter, the Court finds for the plaintiff on each of the ultimate issues of fact. The argument that conditions as of the date of trial should control the action is rejected, first for the legal reason that complaints, and the proof of same, must relate to conditions as of the date of filing; plaintiff is always entitled to judgment, if only for costs, if it proves the essential elements of its complaint as of such time. It is true that the initiation of a legal action may, and frequently does motivate the defendant to grant all or part of the relief sought prior to trial, thus rendering the action moot in whole or in part. In a simple action such as a suit on account, where the only relief sought is money, it is obvious

that payment in full by the defendant before trial would effectively render the action moot for all time, save for payment of costs. Where the relief sought is equitable, however, particularly in a complex case such as this where the equitable relief sought is affirmative rather than being limited to a negative injunction, voluntary compliance in advance of trial would not deprive the Court of jurisdiction to insure the continuation of such compliance by appropriate orders. In any event, however, the Court finds that the Board had not, as of the date of trial, effectively desegregated its school system to the extent required by *Brown II*.

III. HISTORY

Perhaps one of the greatest public misunderstandings as to the operation of the public schools of the State of Indiana is that the responsibility for the conduct of such schools is purely local. It is not difficult to understand the basis for such misconception as the schools are, as a practical matter, operated by local boards, locally elected, subject only to the general oversight of the Indiana State Board of Education and the State Superintendent of Public Instruction. They are paid for to a large extent by funds derived from local property taxes. That part of the property tax allocated to the funding of the public school system constitutes by far the largest portion of the taxes levied in every taxing unit of the State. (The 1971-72 budget adopted by defendant Board is in excess of $82,000,000.)

Nevertheless, the fact remains that the ultimate responsibility for the public schools, and the duty to provide a "general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all"

is placed squarely upon the State[1]. It has therefore been held in numerous cases that the State school system is a State institution, and that school corporations organized under, or by virtue of, the laws of the State are but the agents of the State.[2] Therefore, in reviewing briefly the events leading up and contributing to the educational plight of the Negro in Indianapolis in 1954, 1968, and at present, it is necessary and proper to consider historic policies of the State and various of its agencies, as well as the acts and omissions of the Board itself.

A. Territorial Attitudes

The first twenty Africans who lived within the boundaries of what later became the original thirteen States landed at Jamestown, Virginia, in 1619, thus predating by a year the more highly publicized landfall at Plymouth Rock. In early Virginia, as in other colonies, the first Negro settlers were free, and accumulated land, voted, testified in court and mingled with whites on a basis of equality.[3] Unfortunately for them and their progeny, in the 1660's Virginia, Maryland and other states enacted the first of a series of laws which later led to the establishment of slavery on the basis of race, with results which are well known.

Virginia and Virginians played major roles in the early history of Indiana. At one time Kentucky was merely a

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[1] Constitution of the State of Indiana, 1851, Art. 8, § 1.

[2] Ratcliff v. Dick Johnson School Twp., 1933, 204 Ind. 525, 185 N. E. 143, Greathouse v. Board of School Com'rs, 1926, 198 Ind. 95, 151 N. E. 411; Ehle v. State ex rel. Wissler, 1922, 191 Ind. 502, 133 N. E. 748; School Town of Windfall City v. Somerville, 1914, 181 Ind. 463, 104 N. E. 859; Jordan v. Logansport, 1912, 178 Ind. 629, 99 N. E. 1060; State ex rel. Warren v. Ogan, 1902, 159 Ind. 119, 63 N. E. 227; Freel v. School City of Crawfordsville, 1895, 142 Ind. 27, 41 N. E. 312.

[3] L. Bennett, Jr., Before the Mayflower, 29-36 (3rd Ed. 1966).

county of that Commonwealth, which also claimed all of the lands north and west of the Ohio River, east of the Mississippi and south of Canada. Many of the earliest white settlers of Indiana were Virginians and they, together with persons of similar background from Kentucky and the Carolinas, all States where slavery was practiced, made up the majority. When Virginia ceded the Northwest Territory in 1784, it was pursuant to a reservation of land to be donated to General George Rogers Clark and members of his Virginia regiment for services rendered in the Revolutionary War,[4] and such grants were made—many for tracts in Indiana. The first territorial governor of the Indiana Territory, following its establishment in 1800, was William Henry Harrison, another Virginian. The son of an influential Virginia planter, he could scarcely have avoided the culture of the southern country gentleman.[5]

The ractial attitudes of Harrison and the early settlers of the Territory (which also included, among other land, all of present day Illinois) quickly became apparent. Although Article 6 of the Ordinance of 1787, providing for the government of the Northwest Territory, prohibited slavery and involuntary servitude in the Territory,[6] which provision was carried forward to the Indiana Territory,[7] they set about immediately to secure the repeal or suspension of Article 6.[8] When the Congress failed to act favorably upon their repeated requests, Harrison and the territorial judges, acting in their legislative capacity, went so

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[4] Act of Virginia, December 20, 1783. 1 Burns Ind. Stat. Ann. 369 (1955 Repl.).

[5] J. Barnhart & D. Riker, Indiana to 1816, at 315 (1971) (hereinafter "Barnhart & Riker").

[6] 1 Burns Ind. Stat. Ann. 376 (1955 Repl.).

[7] Act of May 7, 1800. 1 Burns Ind. Stat. Ann. 380 (1955 Repl.).

[8] See generally Barnhart & Riker, 334-335, 347-354.

far as to adopt a law in 1803 providing that Negroes and mulattoes brought into the territory must perform the service due their masters and that contracts between master and servant were assignable.[9] Another such law provided that slaves purchased outside Indiana and brought within the territory had the Hobson's choice of agreeing to being bound to service or of being taken out of the territory (presumably for resale).[10] Some Negroes were bound to service under indentures for as long as ninety-nine years.[11]

B. Statehood: General Policies

Statehood brought no immediate change. Although slavery was once again prohibited, it is noteworthy that of 1,326 Negroes counted in the 1820 census, 503 were candidly listed as slaves.[12] Discrimination became the official policy of the State, as evidenced by the successive Constitutions of 1816 and 1851, and by the laws enacted by the General Assembly. For example, both Constitutions limited the right to vote[13] and to serve in the militia[14] to white males; these restrictions were not removed until the adoption of constitutional amendments in 1881 and 1936, respectively. A statute of 1818, similar to one enacted during the territorial period, declared that no person with a fourth or more of Negro blood could give testimony in court in a case involving a white party.[15]

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[9] Philbrick (ed.), Laws of Indiana Territory, 1801-1809, at 42-46.

[10] *Ibid.*, 136-139.

[11] E. Thornbrough, Since Emancipation, 1 (1963) (hereinafter "Thornbrough").

[12] W. Heiss (ed.), 1820 Federal Census For Indiana (1966).

[13] Constitution of 1816, Art. 6 § 1; Constitution of 1851, Art. 2 § 2.

[14] Constitution of 1816, Art. 7 § 1; Constitution of 1851, Art. 12 § 1.

[15] Acts 1818, Ch. 3, § 52,p. 39.

Intermarriage between whites and persons of Negro blood was likewise prohibited in 1818.[16] Subsequently, the Act was clarified so as to extend the prohibition to a person having one-eighth part or more of Negro blood, and made violation a felony punishable by a fine and imprisonment for from one to ten years. Such statute, as it existed in 1971, was unanimously held constitutional by the Supreme Court of Indiana,[17] notwithstanding the adoption in 1868 of the Fourteenth Amendment to the Federal Constitution. The last reenactment of such law[18] was not repealed until 1965. Similarly, an 1852 act[19] declared such marriages to be void, thus creating obvious limitations on the right of inheritance and other legal benefits upon the death of a spouse.[20] This law, too, was not repealed until 1965.

The most striking evidence of the hostility of the white majority was shown in efforts to exclude Negroes from the state and to persuade those already in the state to leave. A law of 1831, which was seldom enforced, required Negroes coming into the state to post bond as a guarantee against becoming a public charge and as a pledge of good behavior. More drastic was Article 12 of the constitution of 1851 which flatly prohibited Negroes and mulattoes from coming into the state and which provided for pen-

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[16] Acts 1818, Ch. 5, § 59, p. 94.

[17] State v. Gibson, 1871, 36 Ind. 389.

[18] Acts 1905, Ch. 169, §§ 638, 639, p. 584.

[19] 1 R. S. 1852, Ch. 67, § 2, p. 361.

[20] As recently as 1940 the 1852 Act was raised in defense of a claim for death benefits under the Indiana Workmen's Compensation Act, the contention being that the widow, a Negro, could not have been married to the decedent because he was white. The Appellate Court held the defense good as a matter of law, if proved, but affirmed the Industrial Board's award to the widow on the interesting ground that the decedent, a Mexican, had not been proved to be "white." Inland Steel Co. v. Barcena, 1942, 110 Ind. App. 551, 39 N. E.2d 800.

alties for persons who encouraged them to come. Closely linked to the exclusion movement was the colonization movement, which sought to preserve the soil of Indiana for white men by sending Negro residents to Africa. A state colonization society, affiliated with the American Colonization Society, had been organized in 1829 but had never accomplished much. Article 13 of the Constitution of 1851 contained a section encouraging colonization. For several years the state legislature appropriated money for a colonization fund and paid the salary of a State Agent who was supposed to encourage Negroes to emigrate to Africa.[21] Article 13 was held to be null and void in 1866.[22]

In 1885, the General Assembly passed a civil rights law providing that all persons within the jurisdiction of the State were entitled to full and equal enjoyment of the accommodations of "inns, restaurants, eating-houses, barber shops, public conveyances on land and water, theaters, and all other places of public accommodation and amusement;" such law also prohibited discrimination because of race or color in the section of jurors.[23] It is common knowledge that until the past decade, many parts of this law were more honored in their breach than in their observance, particularly as to the first four categories, often with an assist from the judicial arm of the State.[24] Negroes were rarely admitted, save on a segregated basis,

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[21] Thornbrough, p. 2.

[22] Smith v. Moody, et al., 1866, 26 Id. 299.

[23] Acts 1885, Ch. 47, p. 76.

[24] See, for example, the ingenuous decision in Chochos, et al., v. Burden, et al., 1920, 74 Ind. App. 242, 128 N.E. 696, wherein two Negro women refused service in a Greek candy kitchen selling ice cream, soda water, etc., for consumption on the premises had their judgments for nominal damages reversed on the ground that such an establishment did not constitute an "eating-house."

to theatres,[25] public parks, and the like, including State parks operated by the Indiana Department of Conservation, until after World War II. They were confined to segregated wards in public hospitals supported by tax funds, and as we shall see, largely attended segregated schools.[26]

C. Housing Policy

Before turning attention to the schools, however, another area of segregation needs mention, and that is in the matter of housing. Just as was the case in Virginia, so in Indianapolis persons of African descent were present from the beginning. It has been recorded that on the very mission which resulted in the location of the new state capitol on the banks of Fall Creek, Governor Jennings was accompanied by a Negro boy known to history only as Bill.[27] More to the point, Ephriam Ensaw, a freed man who worked for wages, settled in the new town, along with various white settlers, even before the surveyors had finished staking the lots.[28] However, by the time the first German and Irish immigrants had been imported in 1836 to work on the Central Canal, most Negroes were to be found in "Colored Town," on the outskirts of the mile square,[29] and were later concentrated in the area around Indiana Avenue.

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[25] In 1932, when an Indianapolis movie house opened its doors free to Butler University students in celebration of a football victory, Negro students were barred. Thornbrough, p. 88. (Presumably, however, the celebrants all marched to the tune of *Butler Will Shine Tonight*, the school cheer song written, when a student, by Noble Sissle, an Indianapolis Negro. Sissle went on to national fame as a musician, composer, orchestra leader, and writer/producer of successful Broadway musicals.)

[26] For an extended discussion of these and similar examples of State imposed or tolerated segregation, see Thornbrough, pp. 86-93.

[27] Leary, Indianapolis The Story of a City (1970), p. 8 (hereinafter "Leary").

[28] *Ibid.*, p. 13.

[29] *Ibid.*, p. 50.

Segregation in the housing of Negroes in Indianapolis has persisted at least until the date of the filing of this action.[30] As the evidence in this case discloses without conflict, Negroes were discouraged from purchasing homes in predominantly "white" neighborhoods by various methods: white realtors refused to show homes to Negroes (and no Negro real estate broker was permitted to become a member of the Indianapolis Real Estate Association until 1962), a two-price system was used: a realistic market price to whites and a ridiculously inflated price to Negroes, lending institutions refused to finance homes sought to be purchased by Negroes in "white" areas. Those pioneering Negroes who nevertheless overcame all obstacles and succeeded in purchasing a home were then harassed by such devices as threatening and obscene telephone calls, stones hurled through windows, neighborhood ostracism, etc.[31] Certain streets and other landmarks, such as Fall Creek, White River, certain railroad tracks, etc., were regulated at different times as barriers to be hurdled by Negroes at their peril.

In addition to pressures of the foregoing type, applied by individual whites, residential segregation was also enforced by law, in many instances. Perhaps the best known method was by means of the racial covenant which, when inserted into a deed or plat of a real estate subdivision, limited ownership of the lot to persons of the white race. As may be noted from a cursory observation of plats recorded in the plat books kept in the office of the recorder

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[30] The Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 81, 42 U. S. C. §§ 3601 et seq. was not fully effective until December 31, 1969, and its effects have barely begun to be felt.

[31] One who received such treatment was Mr. Grant Hawkins, a graduate of Indiana University, successful businessman, and first Negro member of the School Board. For a more detailed discussion, see Thornbrough, pp. 22-29.

of Marion County, many of the better known subdivisions, such as Williams Creek Estates, Broadmoor Estates, Meridian Hills, Highwoods Addition, Forest Hills, Wellington Estates, Fall Creek Highlands, Greenslopes, Wynedale, Ellenberger Plaza, and Meridian-Kessler Terrace, contained such covenants, which were routinely enforced until held unconstitutional in 1948.[32]

As shown by the evidence herein, the City of Indianapolis took official action to enforce segregation in 1926 when the City Council, with only one dissenting vote,[33] adopted General Ordinance No. 15, making it unlawful for any Negro "to establish a home-residence on any property located in a white community or portion of the municipality inhabited principally by white people * * *," or for a white person to commit the same act in a Negro community. The ordinance imposed a fine and imprisonment for violation, and further provided that each seven days maintenance of such a residence would be deemed a separate offense.[34] Passage of the ordinance was noted by The Indianapolis News, then and now one of Indiana's leading newspapers, which stated that "Sincere convictions are represented in the ordinance * * *" and "Patience and forbearance are called for."[35] When the Marion Circuit Court held the ordinance unconstitution a short time later. The Indianapolis News had a plan of action. "One thing should be done as soon as possible," it editorialized, "and that is to pave the streets in colored

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[32] The plats of Kessler Park and Crippin's River Park Addition were recorded with racial convenants in 1949, after they had already been held unconstitutional by the Supreme Court in Hurd v. Hodge, 1948, 334 U. S. 24, 68 S.Ct. 847, 92 L.Ed. 1187.

[33] The Honorable Edward B. Raub voted in the negative.

[34] The Mayor and most members of the City Council of this period (not including Raub) had been elected with the support of the Ku Klux Klan. For a short summary of the Klan era see Leary, Ch. 23.

[35] The Indianapolis News, editorial, March 16, 1926.

neighborhoods, and make them so attractive that there will be no desire to get out of them * * *. The surroundings should be made as good as those in white sections, so that there may be no reason for leaving them.''[36] As recently as July 4, 1963, the major Indianapolis newspapers, in their real estate want ad columns, used the designation ''for colored,'' or ''col.'' in describing residential property in certain sections of the city.

It is common knowledge that in many small towns and a few larger ones in Indiana the custom that Negroes were not allowed to stay overnight was so invoidable that it had the force of law and was actually enforced by local officials.[37] Thus today it is noticeable that almost no Negroes are to be found in communities adjoining the School City of Indianapolis. Marion County has three municipalities other than Indianapolis, all contiguous to the School City. Beech Grove, an industrial community of 13,432, has a Negro population of 19. Speedway City, a similar type community, has 68 Negroes out of a total population of 14,951, while Lawrence has 216 Negroes out of a total population of 18,997. Of Marion County's 792,299 residents, 134,474 or 17% are Negro. Of these, approximately 122,086, or 98.5% are confined to the central area served by the defendant School Board.[38]

The Bureau of the Census recognizes approximately 250 standard metropolitan statistical areas in the 1970 census.[39] Such an area is a county or group of contiguous counties which contains at least one city of 50,000 or more inhabitants and which according to certain criteria, are socially

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[36] *Ibid.*, November 24, 1926.

[37] Thornbrough, p. 21.

[38] All statistics are based upon the 1970 census.

[39] Bureau of the Budget, Standard Metropolitan Statistical Areas (1967, as supplemented).

and economically integrated with the central city. The Indianapolis Metropolitan Statistical Area has 1,109,882 inhabitants and includes, in addition to Marion County, the contiguous counties of Boone, Hamilton, Hancock, Hendricks, Johnson, Morgan, and Shelby. The 1970 census figures reflect a total of 2,849 Negroes out of a total population of 317,583 residing in these seven suburban counties, a percentage of 0.897.

D. School Policies to 1949

In early Indiana, as has been seen, the Negro lacked many of the rights which are the ordinary attributes of citizenship. The plain fact is that, although entitled to certain rights under Indiana law, such as the right to own property and the right to personal liberty, Negroes were not considered to be citizens of the State until the adoption of the Fourteenth Amendment to the Constitution of the United State.[40] For this reason, many of the rights conferred upon citizens by the successive Indiana Constitutions were construed as not applying to Negroes.

Thus in an early case it was held that Negro children could not attend school with white children over the protest of a white parent, even if they paid their own tuition.[41] A statute in force in 1861 barred Negroes, mulattoes and the children of mulattoes from admission to the common schools.[42] After the adoption of the Fourteenth Amendment, the General Assembly in 1869 enacted a law providing, for the first time, for the education of Negro children, but providing also for them to be organized into separate

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[40] Corey, et al. v. Carter, 1874, 48 Ind. 327.

[41] Lewis v. Henley, et al., 1850, 2 Ind. 332.

[42] Draper, Trustee, et al. v Cambridge, 1863, 20 Ind. 268.

schools. The statute provided that if there were not a sufficient number of such children within attending distance to form a school in one district, several districts could be consolidated; and if there were not enough to be consolidated within a reasonable distance, "the trustee * * * shall provide such other means of education for said children as shall use their proportion, according to members, of school revenue to the best advantage."[43]

The case of Cory et al. v. Carter[44] was commenced by Carter, a Negro parent of school age children, against the school officials of Lawrence Township, Marion County, to compel them to accept his children as pupils in the "white" district school, such officials having failed to provide any school in that or any adjoining district near enough for his children to attend, whereby they were denied the right to attend any school at all. He secured an order of mandate from the Marion Superior Court, but the Supreme Court reversed, holding that under the 1869 Act Negro children were not entitled to admission in common schools provided for the education of white students. This holding was reaffirmed in subsequent cases.[45]

In about 1868 Indianapolis erected a new school house and, anticipating the 1869 legislation, assigned the old building on Market Street for the education of Negro children.[46] A separate elementary school was opened there in the fall of 1869. Thus at the very inception of public

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[43] Acts 1869, Ch. 16, § 3, p. 41.

[44] Note 40, *supra*.

[45] Greathouse v. Board of School Com'rs, 1926, 198 Ind. 95, 151 N. E. 411; State ex rel. Mitchell v. Gray, et al., School Trustees, 1883, 93 Ind. 303; State ex rel. Oliver, et al. v. Grubb, Trustee, 1882, 85 Ind. 213.

[46] Leary, p. 118.

education for the Indianapolis Negro child, he was segregated by virtue of State law. As will be demonstrated later, *de jure* segregation in the elementary schools continued virtually without change until this action was filed, one hundred years later. The situation with respect to high schools has taken a more erratic course.

Indianapolis' first high school was Shortridge, followed by Emmerich Manual Training and Arsenal Technical. For more than fifty years no separate high school for Negro students was established, and after 1877 school children of both races were permitted to select the high school of their choice, attending on an integrated basis.[47] However, with impetus provided by a petition from the Indianapolis Chamber of Commerce, the School Board on December 22, 1922, adopted a resolution authorizing the construction of a "Colored High School." When such school, Crispus Attucks, was opened in September, 1927, all Negro high school students were forthwith compelled to attend it, regardless of their place of residence in the city. In 1935, Ch. 16 of the Acts of 1869 was further amended to require the Board to provide transportation for Negro students required to travel more than a certain distance by reason of its segregation policies.[48] Thus was instituted the policy of tax-paid transportation of school children (bussing).

Another Act of the 1935 General Assembly is instructive. A law enacted in 1907 had directed township trustees to abandon all schools under their charge at which the average daily attendance had been twelve or fewer pupils. The 1935 act[49] added the following proviso: "Provided, further,

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[47] Acts 1877, Ch. 81, § 1, p. 124, had amended Ch. 16 of the Acts of 1869 to require admission of Negro students to white schools, if no separate school of comparable grade was provided for Negroes.

[48] Acts 1935, Ch. 296, § 1, p. 1457.

[49] Acts 1935, Ch. 77, § 1, p. 231.

that nothing in this act, or in the act to which it is amendatory, shall authorize the discontinuance of any school exclusively for colored pupils where such school is the only school for colored pupils in such school corporation, and any such school heretofore discontinued by the operation of such act shall be re-established." (In sum, trustees were ordered by the State to furnish a separate school building and teacher for the instruction of, for example, one Negro child attending primary school, rather than permit that child to attend a white school).

In 1947, two bills were introduced in the General Assembly, each of which had as its purpose the elimination of segregation based on race, color, creed, etc., in the public school system. In due time, a public hearing was held on one of the bills by the House Committee on Education, at which time the then Superintendent of Schools of defendant Board, pursuant to its authorization, appeared and spoke in opposition. Neither bill passed. However, in 1949 an Act was passed which required desegregation, on a phased basis.[50] Thus ended, at least for a time (see Part VII), the official State policy of segregation.

IV. BOARD POLICIES, 1949-1954

As has been shown, the official policy of the State of Indiana and of its agent, the defendant School Board, was one of *de jure* separation of its Negro and white students prior to 1949. During the 1948-49 school year only 614 out of a total of 11,304 Negro students (5.4%) attended regular elementary schools of racially mixed population. The other 10,690 pupils attended sixteen all-Negro elementary schools and all-Negro Crispus Attucks High School. The

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[50] Acts 1949, Ch. 186, p. 603; Burns Ind. Stat. Ann. §§ 28-6106 to 28-6112 (1970), as amended I. C. 1971, 20-4-1-7 to 20-4-1-13.

faculty and staff of each school was completely segregated, and the Superintendent's administrative staff was all white. Generally, Negro schools were built in Negro residential areas and white schools in white areas, and when residential patterns were mixed, Negro and white attendance zones overlapped. Grade structures were altered to achieve segregation in some instances. Negro students in the elementary grades were required to walk, or were transported to all-Negro schools when there were schools, serving only white students, closer to their homes. None of these facts were denied by the defendants.

The 1949 Act which abolished segregation in the public schools, required segregated districts to begin desegregating a grade a year by permitting those students enrolling for the first time in kindergarten, the first elementary grade, and the first junior and senior high school grades to enroll in the school nearest their homes. Accordingly, the Board adopted a policy which, on its face, generally followed the provisions of the statute.[51]

In some instances where desegregation would have resulted if children had been assigned to the closest school, they were assigned to segregated schools farther from their homes. The Board's construction policies during the period 1949-53 minimized the amount of desegregation that occurred. The formerly "colored" elementary schools generally remained all-Negro. Likewise, though specific student assignments were made for all high schools, Crispus Attucks remained all-Negro. With one exception, students

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[51] There were, however, exceptions to this policy. School 19, serving grades 1-6 in 1948-49, did not enroll first grade pupils in 1949-50. Since it was a Negro school in a predominantly white neighborhood, white students in that neighborhood would have been required to enroll in that school under the April, 1949 policy. Negro first graders who would have attended School 19, enrolled at School 64, a nearby all-Negro school, while white students in the School 19 area attended white School 20.

attending the all-Negro elementary schools, some of which were nearer and more accessible to other high schools, were either assigned exclusively or given an option to attend Attucks; partly as a result of administrative suggestion, the option was usually exercised in favor of Attucks. Further, the transfer policies adopted by the Board facilitated the maintenance of segregated high schools.[52]

At the close of the 1952-53 school year the Board drew fixed boundary lines for all elementary schools.[53] These boundary lines were drawn with knowledge of racial residential patterns and the housing discrimination underlying it. Not only did the Board not attempt to promote desegregation, but the boundary lines tended to cement in the segregated character of the elementary schools. In some instances segregation was promoted by drawing boundary lines which did not follow natural boundaries or were not equidistant between schools.[54] In some instances optional attendance zones between white and Negro schools were adopted in racially integrated neighborhoods. From 1949 to 1953 the high school assignments were maintained in

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[52] One reason for transfers to be given "special consideration" was if a pupil had an older sibling attending the preferred high school. This operated as a grandfather clause permitting white students to escape Attucks, and remained in effect through March, 1970. Furthermore, proximity per se was not a legitimate reason for transfer, unless a student lived more than two miles from the assigned high school; this prevented Negro students who lived within two miles of Attucks from transferring to other high schools which were closer to their residences.

[53] Negro students were, nevertheless, bussed to Negro schools outside their attendance zones from racially mixed areas in at least two cases.

[54] For example, the common boundary between Schools 36 (99.3 Negro in 1953-54) and 60 (11.6% Negro) was within one block of School 36 and some eight to ten blocks from School 60. The boundary between Schools 42 (100% Negro) and 44 (1.2% Negro) required Negro students in one area south of School 42 to cross a canal, a parkway, and two railroad tracks to get to School 42; no such impediment stood between this area and School 44. The School 26 (99.8% Negro) common boundary with School 10 (9.7% Negro) required Negro students in the western one to three blocks of the School 26 zone to cross five railroad tracks to get to School 26; no such impediment existed between this area and School 10.

the same segregatory pattern and the creation of the predominantly white Harry E. Wood High School on the Manual High School campus helped perpetuate the segregation of nearby Crispus Attucks.

At the time of the Supreme Court decision in *Brown I* in May, 1954, the situation was as follows: Of the sixteen "colored schools" as of 1949, two were closed, one was converted to an all-white school,[55] one was subsequently considered part of the Crispus Attucks "Junior Division," and the other twelve were 97.5% or more Negro. Of 2,787 Negro high school students, 1,618 attended Crispus Attucks, and faculty desegregation was minimal. The Board thus began the post-*Brown I* era in May, 1954, in substantially the same position that it ended the official segregation era in 1949. The schools were still segregated by operation of law, by virtue of the acts and omissions of the Board done in defiance of the new requirements of Indiana law.

V. BOARD POLICIES, 1954-1968

From the date of *Brown I* to the date of this action, the Board continued the student and faculty assignment policies of the previous era without change.

Since 1954, the most notable nonracial characteristic of the school system has been growth. The total number of elementary pupils rose from 53,352 in 1954-55 to 82,853 in 1967-68, while the number of schools rose from 87 regular elementary and junior high schools and eight regular high schools in 1954-55 to 113 regular elementary and jun-

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[55] School 19 was converted from an al-Nergo nonneighborhood school to an all-white nonneighborhood school in September, 1953. Almost all the Negro pupils who had attended School 19 were assigned to School 64, as School 64's attendance zone was redrawn to include almost all the Negro students in the area. School 19 served, in 1953-54, two noncontiguous white areas and was located in neither of them.

ior high schools and eleven regular high schools in 1967-68. This growth caused overcrowding problems in many schools at one time or antoher, and the Board had available, and employed, various techniques to deal with this overcrowding.

Among these techniques were attendance zone boundary changes, the construction of additions, the construction of new schools, the provision of transportation or the adjustment of existing transportation, alteration in grade structures, and the location or relocation of special education classes in elementary schools. Often these techniques were combined; e.g., in the construction of an addition and a simultaneous boundary change to relieve overcrowding at two contiguous schools.

The defendant Board has constructed numerous additions to schools since 1954; more often than not the capacity thus created has been used to promote segregation. It has built additions to Negro schools and then zoned Negro students into them from predominantly white schools;[56] it has built additions at white schools for white children attending Negro schools; it has generally failed to reduce overcrowding at schools of one race by assigning students to use newly built capacity at schools of the opposite race.[57] The Board has also constructed simultaneous

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[56] For example, the Board, after hearing complaints about the number of Negroes at School 60, completed the construction of twelve classrooms at School 36 (99.9% Negro) in September, 1959, and zoned some 180 students, predominantly Negro, from School 60 into School 36. Other students, predominantly white, were assigned to School 60 from School 76.

[57] In 1954-55 School 37 (100% Negro) was 104 students over capacity; neighboring School 51 (100% white) was 74 students over capacity. An eight room addition was completed at School 37 in February, 1956. No boundary adjustment was made between 37 and 51, however, and overcrowding at 51 persisted so that by 1958-59, it was 121 students over capacity (and only 1.7% Negro). Finally, in September, 1960, a six classroom addition was completed at School 73 and the boundary between School 51 (5.1% Negro) and School 73 (10.7% Negro) was adjusted so that approximately 75 pupils were sent to School 73 from 51.

additions at contiguous predominantly white and Negro schools,[58] and has installed portable classrooms at schools of one race with no adjustment of boundaries between it and neighboring schools of the opposite race.

The Board has also constructed additions to large, predominately Negro elementary schools when desegregation would have resulted from adding classrooms to nearby, smaller predominantly white schools.[59] These large schools have often had inadequate sites.[60] Of the four largest elementary schools in the system, all are more than 90% Negro, and three have had large additions constructed within the last ten years. For example, an eight classroom addition was completed at School 41 in January, 1962, when it was 99.5% Negro, and had a site of 2.7 acres. For the 1970-71 year this school enrolled 1,404 pupils, 99.7% Negro.

An eight classroom addition was completed at School 64 (99.3% Negro) in September, 1962. Nearby Schools 111 (100% white) and 112 (97.9% white) were purchased after annexation and opened that same month. The children from these latter schools in grades 7 and 8 were transported to School 82 even though School 64 was closer to

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[58] For example, in January, 1957, nine classrooms were added to School 64's neighbor, School 21; in August, 1957, six classrooms were added to School 64. In 1956-57 and 1957-58, School 21 was 99.22% and 98.23% white, and School 64 was 99.08% and 99.77% Negro. As another example, Schools 27, 29 and 45 are within six blocks of one another. From 1954 to 1957 each received additions of four to eight rooms. At the time of construction, School 29 was 85.3% Negro, while 27 and 45 were 96.5% and 95.4% white.

[59] In April, 1961, a survey of elementary principals was taken by the Board, requesting a "professional opinion" as to maximum, ideal, and minimum school sizes. For a K-8 school, the median ideal size designated by the ninety principals returning the questionaire was 600; for a K-6 school, 500.

[60] The State Superintendent of Public Instruction has established minimum acreage requirements of seven acres for the first 200 students and one acre for each additional 100 students.

most of these pupils.[61] This continued through the 1965-66 school year. None of these schools other than 64 was more than 4.5% Negro during such years, while 64 was never less than 99.3% Negro. Further, the faculty at School 64 was 96.4% Negro in 1965-66; the faculties at 82, 111 and 112 were all white that same year.

The failure to assign white children to Attucks had important consequences for the Indianapolis elementary schools. Negro students who formerly had been required to attend Attucks regardless of residence were now permitted, in some cases, to attend high schools closer to their homes. Because there was no off-setting assignment of whites to Attucks, through the arrangement of optional zones and nonneighborhood feeder assignments, the Attucks enrollment dropped substantially during the 1950's while the predominantly white high schools increased in enrollment.

Attucks thus had available space during this period, and could, and did, accommodate elementary students from overcrowded Negro elementary schools. At various times since 1954 the following schools, none of which have ever been less than 96.5% Negro, have been assigned to the Crispus Attucks campus: 63, 17, 23, 24, 40, and 4. Several hundred of these pupils attended school in the Crispus Attucks building during the 1950's. The assignment of students from these elementary schools to Attucks should be contrasted with the assignment of other students, predominantly white, from nearby elementary schools to Arsenal Technical High School during this same period.

During the post-1954 period, the Board perpetuated segregation through the use of optional attendance zones.

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[61] The January, 1967, housing facility study noted that School 82 was "quite crowded during those 4 years" that junior high students were transported to 82 from 111 and 112.

Specifically, in areas of racially mixed residential patterns students were given options between predominantly Negro and predominantly white elementary schools, and where entire elementary districts covered both Negro and white neighborhoods, graduates were given options between predominantly Negro and predominantly white high schools.[62] Students in Negro elementary schools were given options to Crispus Attucks when other, predominantly white high schools were closer and more accesible. White students in optional zones almost always attended white schools.

The Board has perpetuated segregation through the construction of new schools. Specifically, new elementary schools to be attended by students of predominantly one race have been constructed adjacent to schools attended primarily by students of the opposite race,[63] new middle schools have been constructed to enroll the students of one race adjacent to schools attended by students of the opposite race,[64] and new high schools have been located

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[62] School 32 was assigned to Shortridge until September, 1952. At that time, when 32 was 52% Negro, it was given an option to Attucks. By September, 1964, when it was 94% Negro with a 100% Negro faculty, the option was ended and School 32 was assigned solely to Attucks. Similarly, School 44 was assigned to Shortridge until September, 1955, when it was 4.1% Negro. At that time it was given an option to George Washington and Attucks as well as Shortridge. As the percentage of Negroes continued to rise, both the Shortridge and Washington options were dropped and the students were assigned solely to Crispus Attucks.

[63] In March, 1968, a new School 19 building was completed on a site several blocks from the previous School 19. This school was 96.3% white in 1968-69. Its attendance zone is still not justifiable by neighborhood standards, and its construction insured that School 64 (99.5% Negro in 1968-69) would remain virtually all Negro, as it in fact has. A new School 2 (90.4% white in 1958-59) was completed in October, 1958, containing twenty classrooms, while nearby School 40 was all Negro.

[64] Of the various types and sizes of multi-district junior high schools established in the system since 1954, only one has involved the assignment of Negro majority and white majority schools to the same junior high school.

and constructed where they have served predominantly white student populations.[65]

The Board has perpetuated segregation by transporting students from overcrowded schools of one race to schools of the same race rather than to available nearby schools of the opposite race. In contrast to the current local and national hullabaloo about bussing, the Board's minutes record no citizen protests to the bussing of white students to white schools.

The Board has also perpetuated segregation in the assignment of special education classes. Specifically, it has maintained predominantly Negro and predominantly white special education departments at contiguous Negro and white schools and has shifted special education classes between schools with a resultant increase in segregation.[66]

Special education classes often enroll students from a wider area than the normal attendance zone. Thus they can be shifted between several schools in that wider area to relieve overcrowding where necessary. The Board has shifted these classes in some instances and failed to shift them in other instances, always with a resulting increase in racial segregation.

During the 1960's the Board adopted a "Shortridge plan" to prevent Shortridge High School from becoming

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[65] The two most recently constructed high schools in the city (John Marshall and Northwest) have been built on the extreme northeastern and northwestern areas of the city, where the Board knew they would serve virtually all-white areas. Both of these schools have in fact reinforced the growing racial isolation of the inner city.

[66] An all-Negro special education department was maintained at Attucks while an integrated department was maintained at Wood through most of this period since Wood was established in 1953. All-Negro and all-white departments have coexisted in virtually all-Negro School 64 and neighboring predominantly white School 21 almost continuously since September, 1957. Predominantly Negro special education classes exist on the west side at predominantly Negro Schools 63, 52, and 75, while predominantly white classes are housed at nearby predominantly white Schools 30 and 16.

an all-Negro school. This plan had the immediate effect of reducing the number of Negro students in Shortridge, many of whom subsequently attended Attucks. No steps were taken prior to the filing of this suit, however, to desegregate Crispus Attucks, and an addition to Attucks in 1966 coupled with the effect of the Shortridge plan insured the continuation of segregation at Attucks.[67]

Some of the Board's 1954-1968 segregation practices are evident in simple boundary changes. For example, in 1962-63, School 69 was 57.95% Negro and School 11, its northern neighbor, was 100% white. A housing facility study in February, 1963, noted that, with respect to School 69:

> "Census figures for the district indicate a slight decrease during the next five years. The nature of the district is changing considerably, which may cause a further increase; however, serious overcrowding is not anticipated in this district in the next five years."

Despite this assessment, the School 69-School 11 boundary was altered three months later and an all-white area in the School 69 district north of 38th Street was transferred to all-white School 11.[68] School 69's Negro percentage immediately rose to 72.9

According to the evidence, there have been approximately 350 boundary changes in the system since 1954. More than 90% of these promoted segregation.

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[67] Because of the small size of the Attucks site (8.4 acres), a waiver had to be secured from the State Board of Education. This waiver was obtained, with the proviso that no more than 2,200 students attend Attucks; nevertheless, in 1967-68 Attucks enrolled 2,394 students, 2,393 Negro and one white.

[68] In a letter to parents in this area, an Assistant Superintendent justified the boundary change because of "crowded conditions" at School 69.

The results of all of the foregoing policies, coupled with the restrictive housing policies of the entire Metropolitan Area, are clear: since 1954 the percentage of Negro students in the system has increased from 20 to 36, and the segregation has likewise increased. The number of 90% or more Negro schools has risen from thirteen to twenty-five. In 1954-55, 85.9% of the Negro elementary students were in majority Negro schools; in 1968-69, the percentage had risen to 88.2. In 1968-69 Crispus Attucks was 99.8% Negro.[69] Faculty and staff were assigned on a racially segregated basis, meaning that Negro schools had all-Negro, or virtually all-Negro faculties, and vice versa. In short, nothing really changed during the 1954-1968 period, and the Indianapolis school system on the date this suit was filed remained segregated by operation of law.

VI. BOARD POLICIES SINCE MAY 31, 1968

In May, 1968, after the Board received notification of the plaintiff's intention to file suit if deficiencies were not corrected,[70] it contracted with Indiana University to study elementary school boundaries "for the purpose of determining the best method of achieving maximum desegregation of all schools • • • under the neighborhood concept."[71] A "Special Study Committee" of independent consultants was formed, which issued its report in April, 1969, making no recommendations for the promotion of integration through boundary changes. The activities of this Committee may best be characterized as farcical, since

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[69] The first white attended that school in 1967-68, when one white student was enrolled.

[70] This was a "notice letter" under Title IV of the Civil Rights Act of 1964; 42 U. S. C. § 2000c-6.

[71] The so-called "neighborhood concept" was not adopted as a formal policy until 1965 and, as has been demonstrated, has proved meaningless in practice. Its principal use is as a slogan for those opposed to bussing across racial lines.

according to the testimony of one of its members, it was not furnished with data as to the racial composition of the students or faculty at any school.

In February, 1969, the Board requested a study of, and recommendations for, the desegregation of the Indianapolis schools in a letter to the Office of Education, United States Department of Health, Education and Welfare (hereinafter "HEW"). A team of six educators from HEW visited the system for four days in March, 1969, and prepared a series of recommendations for both the elementary and high schools in the system.[72] These recommendations were presented to the Board on April 18, 1969. On June 17, 1969, the Board rejected the HEW recommendations, finding that they were not a "satisfactory or workable solution to the integration problem of the schools."[73]

In the same statement rejecting the HEW recommendations, the Board called for the appointment of a community-based committee to recommend programs to improve integration, with the first priority directed toward secondary schools.[74] The committee was formed and in October, 1969, filed majority and minority reports. The majority recommended the construction of a new Crispus Attucks (presumably, although not explicitly stated,

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[72] Mr. Johnson, the leader of this team, testified that he recognized that time was too limited to draw a comprehensive plan; therefore, the recommendations of the team were threefold: (a) to study the possibility of grade reorganization to desegregate the system; (b) the submission of a series of specific reorganizations for specific schools to be implemented by September, 1969, as examples of methods of desegregation and as an act of good faith by the Board; and (c) general recommendations for the amelioration of segregation at Crispus Attucks.

[73] However, a study of the feasibility of the HEW recommendations undertaken by the Board had concluded that, with respect to the elementary schools, all were feasible except for an alternate plan to desegregate School 64 and the plan to desegregate Schools 43 and 66.

[74] Specifically, the committee was to recommend solutions to "the problem presented by Crispus Attucks High School as it now exists."

racially desegregated) and also recommended free transfers for high school students regardless of assignment.[75]

Soon after this report, the Superintendent established a staff committee to treat the problem of the desegregation of Attucks. This committee recommended the construction of a new Attucks and the phase-out of the present Shortridge and Attucks. The Board ultimately rejected the proposed phase-out of Shortridge, but directed the Superintendent to search for a site for the new Attucks; no new site has been found.

During the 1970-71 school year, ninth graders assigned to Attucks under a revised feeder system (which desegregated this ninth grade class) attended school at Northwest High School and the Tudor Hall School.[76] Because no site has been found available for a new Attucks, the defendants plan to assign desegregated freshman and sophomore classes to the present Attucks campus in September, 1971. Grades 11 and 12 will remain virtually all Negro, and if this grade-a-year plan is continued, Attucks will remain partially segregated until September, 1973.

During the 1967-68 school year, the School Board decided to establish a middle school (to be known as the Forest Manor Middle School) housing grades 6, 7, and 8 and serving an area comprising the attendance zones of Schools 1, 71, and 73, each of which elementary schools was then, and is now, severely overcrowded. The building of the Forest Manor Middle School was not begun in 1968,

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[75] The minority recommended enrichment of the educational program at Attucks and free choice in high school student assignment. The committee submitted no further reports, and did not consider elementary school desegregation.

[76] The Tudor Hall School was purchased by the Board for eventual use as a special education facility. The State Superintendent objected to more than 650 students being housed on that site, so part of the Attucks desegregated freshman class was assigned to Northwest High School.

as planned, but the project has been revived, and the School Board is on the point of awarding contracts for the construction of the Forest Manor Middle School. The Board's plans for the utilization of this middle school are being reconsidered, because of plaintiff's objections to its proposed use and location. During the 1970-71 school year the percentage of Negro students at Schools 1, 71 and 73 was 91.4, 92.6, and 69.6, respectively, and the proposed location of the Forest Manor school is in a predominantly Negro residential area. It is apparent that, as matters stand, the proposed school would tend to perpetuate segregation.

The Board adopted a majority-to-minority transfer provision on June 30, 1970. For the 1970-71 school year approximately 400 high school and 50 elementary school students transferred under this provision, and at the time of trial 300 students had applied for such transfers for the 1971-72 school year.[77]

Since this suit was filed the Board has provided various school services on a nondiscriminatory basis.[78] Transfer policies have been administered so as not to increase segregation. A black history curriculum has been developed. Efforts have been made to recruit additional Negro faculty members, and Negro professional employees have been promoted to responsible positions in the central administrative office. A resolution adopted December 8, 1970, commits the Board to a program for the integration of

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[77] Under this provision, students can transfer from a school in which their race is in a majority to a school in which their race is in a minority. The transfers are contingent, under the terms of the policy, on the availability of space, and no transportation is provided. No transfers are accepted under this provision after school has been in session two weeks in September.

[78] Among these have been special and social services, lunch programs, libraries, and a program to combat dropouts.

administrative staffs (including the coaching staff) in each high school.

In October, 1970, the Board entered into a contract with the Office of Education, HEW, under which the latter provided funds for it to employ "advisory specialists" to prepare desegregation plans and in-service training programs for the Indianapolis system. Two such advisory specialists were employed,[79] and presented four plans to the Board on April 1, 1971. Three of these plans treated only eleven all-black, or virtually all-black schools, while the fourth, and recommended plan desegregated every school in the system. On May 25, 1971, the Board rejected all plans, noting that the trial in this cause was to commence July 12, 1971. It thus appears that the Board, having taken some steps toward rectifying its previous failure to comply with *Brown II,* is unwilling to proceed further unless directed to do so by the Court.

VII. EXTERNAL PROBLEMS FACING THE BOARD

Despite the fact that the Board, through the years, has consistently employed policies and practices causing and maintaining racial segregation in the School System under its control, it is only fair to say that various factors not of its own making have contributed to that result.

A. Changes in Racial Characteristics of School City

The racial characteristics of the School City changed significantly during the period 1954 through 1970. The number of Negroes residing in the School City increased rapidly, both absolutely and proportionately to the entire

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[79] Both of these specialists were already employees of the Indianapolis system: one was a former principal and consultant, while the other was a former teacher and had held an administrative position in the central office.

population of the School City. The number of areas of the School City in which significantly large groups of Negroes resided increased similarly. The pattern of the change in the location of black residential areas was one of expansion from the center of the School City toward its boundaries. While the Negro population was increasing within the School City, the white population within the School City was decreasing rapidly, and concurrently, the white population in Marion County outside the School City was increasing rapidly.[80]

In 1960, the population of Center Township (all of which, except a small part of Beech Grove, lies within the School City) was 333,351, of which 243,448 (73%) were white and 84,439 (26.8%) were Negro; in 1970, the population of Center Township had declined to 273,598, of which 166,622 (61.2%) were white and 106,112 (38.8%) were Negro.

In 1960, the population of Marion County excluding Center Township was 364,216, of which 353,659 (97%) were white and 10,473 (2.9%) were Negro. In 1970, the population of Marion County excluding Center Township was 518,701, of which 488,538 (94%) were white and 28,342 (5.4%) were Negro. The data also show that, whereas 59% of the white population of Marion County lived outside Center Township in 1960, about 74.5% of that group lived outside Center Township in 1970.

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[80] As found in Section III-C, *supra*, discrimination against Negroes in the matter of housing, enforced or condoned by the City and State has been a major factor in confining the Negro to a compact, central area.

The areas of the School City in which the change in racial composition has been significant in the last ten year period include:

(1) An area bounded, generally, by 38th Street on the north, Arlington Avenue on the east, 21st Street on the south, and Boulevard Place on the west. The eastern part of this area is often referred to as "the Forest Manor area." The change in the racial composition throughout the area is reflected in the changes in the racial composition of several of the elementary schools which serve the area, which changes are shown in the table below:

School No.	Negro Students (Percent of Total) in 1960-61	Negro Students (Percent of Total) in 1970-71
1	0.16	91.4
11	0.0	32.5
51	5.09	78.7
53	0.21	32.6
60	44.55	99.6
66	0.44	86.1
69	31.31	98.5
71	2.92	92.6
73	10.73	69.6
76	53.61	99.0
83	(not open)	41.7
99	0.0	29.3
110	(not open)	98.4

(2) An area bounded on the north by 63rd Street (Broad Ripple Avenue), on the east by the tracks of the Monon Railroad, on the south by 38th Street, and on the

west by the Indianapolis Water Company canal, where similar changes are shown in the table below:

School No.	Negro Students (Percent of Total) in 1960-61	Negro Students (Percent of Total) in 1970-71
55	0.0	8.5
66	0.44	86.1
70	0.0	28.1
84	0.0	2.2
86	12.36	53.5

(3) Scattered areas, in each of which the population shift is reflected by a similar sharp change in the racial composition of elementary school population, which changes are shown in the table below:

School No.	Negro Students (Percent of Total) in 1960-61	Negro Students (Percent of Total) in 1970-71
27	45.20	87.3
38	38.63	91.90
45	28.19	98.00
75	24.82	77.50

At the beginning of the 1970-71 school year, the number of students enrolled in the elementary schools was 79,587, excluding students enrolled in the special education schools. During the 1970-71 school year, the total enrollment was reduced to 77,658; the difference of 1,929 between the October and June enrollment totals is the net result of a departure of 2,122 white students from the elementary schools and an inflow of 193 Negro students to the elementary schools. Of the 110 elementary schools, 13

showed gains, and 81 showed losses, in the number of white students enrolled during the 1970-71 school year.

B. Low-Rent Housing Projects

Low-rent housing projects within the School City have significantly affected the racial composition of the schools. A project typical of this kind is constructed at the periphpery of an established Negro residential area and, for that reason among others, attracts a Negro occupancy, which is eventually reflected in the racial composition of the school that serves the area in which the project is situated.

Such an effect is to be seen in several elementary schools, including: School 67, in which Negroes constituted 4% of the student body in 1968-69 and 30.9% in 1970-71, owing to the opening of Eagle Creek Village at Tibbs Avenue and Cossell Road; School 112, in which Negroes constituted 13.7% of the student body in 1968-69 and 42.9% in 1970-71, owing to the opening of Raymond Villa, at Raymond Avenue and Perkins Street; School 71, in which Negroes constituted 10.8% of the student body in 1965-66 and 92.6% in 1970-71, owing to the opening of Hawthorne Place at 32nd Street and Emerson Avenue; and School 99, in which there were no Negro students in 1968-69 and in which Negroes constituted 33.9% of the student body at the end of the 1970-71 school year, owing to the opening of Beechwood Gardens at 30th Street and Graham Avenue.

Housing projects of the kind just described not only have racial consequences for the schools; each of them tends to represent, as well, a demand for a significant amount of school space. Eagle Creek Village, Raymond Villa, and Beechwood Gardens necessitated additions to Schools 67, 112, and 99, respectively, each of which cost

about $1,300,000. Salem Village, at 30th Street and Baltimore Avenue, necessitated the construction of a complete school (School 110), which has served a virtually all-black student body since it was opened in 1966.[81]

C. Noncooperation of Local Officials

Some of the reasons why no new site for Attucks has been acquired are directly attributable to action or inaction on the part of certain agencies of the civil government of the City of Indianapolis. One possible site is a 54 acre, undeveloped tract at the southwest corner of the intersection of 38th Street and White River. Although a part of the land is low, there is more than adequate high ground for buildings, and the low ground is protected by a levee. This tract is owned by the City of Indianapolis, which could presumably make it available to the School City free under Indiana law,[82] or in any event make the transfer for a nominal price.[83] However, the City has declined to consider parting with the 54 acres, on the ground that it is needed for use as a nursery for the Department of Parks and Recreation. The City's sense of priorities strikes the Court as curious.[84]

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[81] The plaintiff United States of America, which of course sponsors federally supported housing projects, has suggested a finding that the locations of six of the ten projects opened in the School City since 1965 have tended to promote integration in those instances. There is insufficient evidence to support such a finding.

[82] See Acts 1957, Ch. 229, p. 501, as amended; Burns Ind. Stat. Ann. §§ 53-403, 53-404, I. C. 1971, 5-18-1-1, 5-18-1-2.

[83] The Court estimates that the cost of a school site in an appropriate location, if purchased on the open market, would run from at least $12,500 to $17,500 per acre.

[84] In addition to the fact that use of the White River tract as a nursery does not appear to be its highest and best use, it is also instructive to note that the Department has available for nursery purposes various parts of the 2,650 acre non-reservoir portion of its virtually undeveloped Eagle Creek Park. Note also that approximately half of the 54 acres would meet State per-pupil minimum land requirements (Footnote 60, *supra*), leaving the balance available for planting to trees and shrubs.

Another likely site for the new Attucks was determined to be a tract at 30th Street and Guion Road, and the Board acquired an option to purchase the tract. It then filed an application to have the land rezoned for school use, only to have its application denied by The Metropolitan Development Commission of Marion County, which asserts the right to control the use of all land in the county, including that proposed to be dedicated for public purposes.

D. Legislative Action Since 1949

As noted briefly above, the State's long time policy of *de jure* segregation obstensibly ended in 1949 with the passage of Chapter 186 of the Acts of that year.[85] The new policy of the State, as set out in the first section of the Act, was stated to be as follows:

> "It is hereby declared to be the public policy of the State of Indiana to provide, furnish, and make available equal, nonsegregated, nondiscriminatory educational opportunitites and facilities for all regardless of race, creed, national origin, color or sex; to provide and furnish public schools and common schools equally open to all and prohibited and denied to none because of race, creed, color, or national origin; to reaffirm the principles of our Bill of Rights, Civil Rights and our Constitution and to provide for the State of Indiana and its citizens a uniform democratic system of common and public school education; and to abolish, eliminate and prohibit segregated and separate schools or school districts on the basis of race, creed or color; and to eliminate and prohibit segregation, separation and discrimination on the basis of race, color or creed in the public kindergartens, common schools, public schools, colleges and universities of the state."

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[85] Note 50, *supra*.

Note that the State completely anticipated and completely adopted the holding in *Brown I* by a full five years. Because of *Brown I*, moreover, it is impossible for the State legally to change its professed policy, because that policy has now assumed the stature of a Constitutional imperative, far above the power of the State to detract therefrom. With these principles in mind, the Court examines certain post-1949 legislation enacted by the General Assembly.

Historically, it was well established by the common law of the State that whenever an incorporated city or town expanded its corporate limits, the school city or town succeeded to the powers and duties of the township trustee with respect to the administration of the public schools. In other words, the boundaries of a school city and of a civil city are coterminous.[86] This rule was recognized in a 1931 Act, pertaining to the defendant School Board, as follows: "In each civil city of this State having * * * more than three hundred thousand [300,000] inhabitants there shall be a common school corporation hereinafter called the 'school city' whose duties and powers shall be coextensive with the corporate boundaries of such civil city. * * *"[87] When such Act was amended in 1955 in order to increase the size of the Board, among other things, such provision remained unchanged.[88]

However, in 1961 the General Assembly crippled this policy by an Act which provided that, with respect only

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[86] Board of School Com'rs v. Center Twp., 1896, 143 Ind. 391, 42 N. E. 808; School Twp. of Allen v. School Town of Macy, 1887, 109 Ind. 559, 10 N. E. 578; School Town of Leesburgh v. Plain School Twp., 1877, 86 Ind. 582; State ex rel. Mt. Carmel School Corp. v. Shields, 1877, 56 Ind. 521; Carson v. State, to Use of Town of Hanover, 1867, 27 Ind. 465.

[87] Acts 1931, Ch. 94, § 1, p. 291; Burns Ind. Stat. Ann. § 28-2301 (1948 Repl.), I. C. 1971, 20-3-11-1.

[88] Acts 1955, Ch. 123, § 1, p. 291; Burns Ind. Stat. Ann. § 28-2301 (1968 Cum. Supp.).

to Marion County, the extension of the boundaries of a civil city by a civil annexation would work only a prima facie extension of the boundaries of the school city, and render such school city extension subject to a separate remonstrance by the losing school corporation.[89] Thus, for the first time, it became possible for the School City of Indianapolis, alone among the major school cities of the State, to have jurisdiction over a lesser territorial area than the corresponding civil city.

Even more grave in import are Chapters 52 and 173 of the Acts of the 1969 General Assembly. Section 3 of Chapter 52 amended Chapter 186 of the Acts of 1961 to abolish the concept that the school and civil cities in counties having a city of the first class[90] would have coterminous boundaries, and limited the School City of Indianapolis to enlarging its territory by one of the two methods authorized in the 1961 Act in addition to automatic prima facie extension on enlargement of the civil city: (1) by agreement with the school corporation losing territory, or (2) by unilateral annexation by the School City of all or part of the territory of another school corporation.[91] Both procedures are subject to remonstrance. Futher, said Section repealed Section 9 of Chapter 186 of the Acts of 1961 as to all enlargements of the School City claimed to have been made pursuant to civil city annexations and not yet finally effective. I. e., in cases where remonstrances and/or court actions were pending against School City annexations pursuant to Section 9 of the 1961 Act, the annexations were simply canceled by legislative fiat.

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[89] Acts 1961, Ch. 186, §§ 1, 9, 10; Burns Ind. Stat. Ann. §§ 28-2338, 28-2346, 28-2347 (1968 Cum. Supp.), I. C. 1971, 20-3-14-1, 20-3-14-10.

[90] Indianapolis is the only city of the first class in Indiana.

[91] Acts 1969, Ch. 52, § 3, p. 57; Burns Ind. Stat. Ann. § 28-2346a (1970 Cum. Supp.), I. C. 1971, 20-3-14-9.

Chapter 173[92] is formally titled the "Consolidated First Class Cities and Counties Act," and is hereafter referred to by its more familiar name, "Uni-Gov." This Act purports, in general, to consolidate the civil governments of the former City of Indianapolis and of Marion County into a unified, metropolitan, city government, with certain exceptions,[93] which expanded or consolidated city continues to be known as the City of Indianapolis.

The Uni-Gov Act provides expressly that "any school corporation, all or a part of the territory of which is in the consolidated city or county" shall not be affected by the Act.[94] Thus Uni-Gov leaves the defendant School City exactly where it found it: confined to an area in the central part of the consolidated City of Indianapolis, where it is surrounded by eight township school systems operating independently within the purportedly unified City, and by two additional independent school corporations operated by Beech Grove and Speedway City (hereinafter, in the aggregate, "outside school corporations"). For the 1969-70 school year these outside school corporations together had 73,205 students enrolled, of whom 2.62% were Negro, and together employed 3,037 teachers, of whom 15, or 0.49% were Negro.

The outside school corporations compete effectively with the School Board for teachers. Since the filing of this action, some white teachers employed by the Board and

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[92] Acts 1969, Ch. 173, p. 357; Burns Ind. Stat. Ann. §§ 48-9101—48-9507 (1970 Cum. Supp.), I. C. 1971, 18-4-1-1 to 18-4-5-4.

[93] The cites of Beech Grove and Lawrence ("excluded cities") and the incorporated town of Speedway City ("excluded town") are permitted to carry on as separate municipal corporations within the territory of the consolidated city, but the voters of these communities are entitled to vote for candidates for the offices of mayor and city-county councilman of the consolidated city, was well as for the corresponding officials of their respective excluded city or town.

[94] Acts 1969, Ch. 173, § 314, p. 357; Burns Ind. Stat. Ann. § 48-9213 (1970 Cum. Supp.), I. C. 1971, 18-4-3-14.

requested to transfer to integrated schools have declined transfer and found havens in the outside schools. The outside schools have likewise contributed to the exodus of white students from the School City by accepting them for transfer, on payment of tuition.

Considering the history of segregation of the Negro in Indiana and in Indianapolis, the racial complexion of the outside school corporations and of the adjoining counties in the Indianapolis Metropolitan Area, the ongoing flight to the suburbs by the white population of the School City, and the various other factors above set out, the effect of the 1961 and 1969 Acts of the General Assembly referred to in this section may well have been to retard desegregation and to promote segregation. In other words, under previous Indiana law, which still applies to all cities except Indianapolis, civil annexation would automatically carry school annexation with it, and the chances of successful remonstrance against logical annexation by an expanding municipality, carrying with it the usual municipal services, would be virtually nil. Under the present law, if valid, the ability of the Board to expand its jurisdiction coterminous with the consolidated city, or for that matter to expand it at all, is likewise virtually nil, as a practical matter.

E. The Tipping Factor

The undisputed evidence in this case, agreed to by plaintiff's expert from the Office of Education, is that when the percentage of Negro pupils in a given school approaches 40, more or less, the white exodus becomes accelerated and irreversible. Therefore, resegregation rapidly occurs, and the entire central core of the involved city develops into a virtually all-Negro city within a city when, as in Indianapolis, the Negro residential area is

largely confined to a portion of the central city in the first place.

During the trial, this Court repeatedly attempted to cause the plaintiff United States of America to produce statistics from HEW showing comparative racial statistics for the school systems of the larger school cities of the nation before and after active desegregation efforts were commenced. The Court was advised that no such statistics were available, incomprehensible as that might seem considering that such Department is the Federal agency directly concerned with the problem.

However, according to HEW's news release of June 18, 1971, in evidence the percentage of Negro students in certain public school systems as of fall, 1970 was as follows (in order according to total pupils in system): New York 34.5; Chicago 54.8; Detroit 63.8; Philadelphia 60.5; Houston 35.6; Baltimore City, Maryland 67.1; Cleveland 57.6; Washington, D. C. 94.6; Memphis 51.5; St. Louis 65.6; Orleans Parish (New Orleans), Louisiana 69.5; Atlanta 68.7; Birmingham 54.6; Caddo Parish (Shreveport), Louisiana 49.0; Louisville 48.3; Richmond, Virginia 64.2; Gary 64.7; and Compton, California 82.0. In some of these cities an additional sizable percentage of the student population belongs to another minority group which historically has been, and still is subject to racial discrimination: those with Spanish surnames, presumably of Mexican or Puerto Rican descent. When these percentages are added, the total minority race percentage of pupils in such cities is as follows: New York 60.2; Chicago 64.6; Houston 50.0; and Compton, California 94.4. All of these school cities, as well as others which would be named,[95] appear to be completely

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[95] Strangely, the HEW release failed to list Newark, New Jersey, where the combined minority percentage is known to be at least 70.

beyond hope of meaningful desegregation, absent some dramatic change in their boundaries. In the absence of HEW statistics to the contrary, the Court infers that desegregation efforts have had much to do with the current figures as above quoted.

The brutal truth as to what may happen when a court and a school board undertake in good faith to apply across-the-board desegregation in situations when racial balances reach the tipping point is well illustrated in the rather poignant opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, Calhoun et al. v. Cook et al., 332 F.Supp. 804, handed down on July 28, 1971. Pointing out that Atlanta in 1961-62 was one of the first major southern cities officially abandoning the dual school system, it noted that in the ten year interim the balance has shifted from 70%-30% white to 70%-30% Negro, and that the remaining 30 whites were themselves confined to two areas. The court declined to order further enforced measures, as being futile.

VIII. CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of this action under Section 407 of the Civil Rights Act of 1964 (42 U.S.C. § 2000c-6) and under 28 U.S.C. § 1345.

2. Pursuant to the Fourteenth Amendment and Title IV of the Civil Rights Act of 1964 this Court has jurisdiction to hear and to decide all issues concerning alleged racial discrimination in public education in the Indianapolis School System, including the defendant Board's policies with respect to assignment and transfer of students, the allocation of faculty and staff, the location and construction of schools, the transportation of students, and

the general educational structure and process. United States v. School District 151, N.D. Ill., 1968, 286 F.Supp. 786, aff'd 7 Cir., 1968, 404 F.2d 1125.

3. The Court having found for the plaintiff that the defendant School Board was on May 17, 1954, May 31, 1968, and as of the date of trial operating a segregated school system werein segregation was imposed and enforced by operation of law, the law is with the plaintiff. Therefore, the Board is "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination (will) be eliminated root and branch." Brown v. Board of Education *(Brown II)*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083; Green v. County School Board, 1968, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716.

4. All provisions of federal, state or local law requiring or permitting racial discrimination in public education must yield to the principle that such discrimination is unconstitutional; revisions of local laws and regulations and revision of school districts may be necessary to solve the problem. *Brown II.*

5. This Court has continuing jurisdiction to make and enforce such decrees in equity as are necessary to accomplish the above mentioned objective. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. Swann v. Charlotte-Mecklenburg Bd. of Ed. *("Swann")*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554.

IX. FURTHER PARTIES AND PROCEEDINGS

As noted herein, the percentage of Negro elementary pupils within the School City had reached 37.4 as of the

past school year, and was slowly rising. Fortunately, the change has not yet become a rout, and the Court recognizes that a substantial part of the increase during the past fifteen years has been caused by immigration from the Southern States, which has virtually ceased. The Court is further of the opinion that the white citizens of this community are less likely than those of certain of the cities listed in part VII hereof to succumb to the enslavement of unreasoning racial fears, and recognizes that there are many good reasons for moving to the suburbs which have nothing to do with this case.

Nevertheless, it is obvious that something more than a routine, computerized approach to the problem of desegregation is required of this Court, lest the tipping point be reached and passed beyond retrieve.[96] This is particularly true in the light of the dictum in *Swann* to the effect that "neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of students bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." Put another way, the easy way out for this Court and for the Board would be to order a massive "fruit basket" scrambling of students within the School City during the coming school year, to achieve exact racial balancing, and then to go on to other things. The power to do so is undoubted. There is just one thing wrong with this simplistic solution: in the long haul, it won't work.

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[96] The plight of the Negro citizen, still striving for equality 352 years after Jamestown, recalls the familiar words of the Red Queen to Alice: "Now here, you see it takes all the running you can do, to keep in the same place. If you want to get somewhere else, you must run at least twice as fast as that!" L. Carroll, Through the Looking-Glass.

With due regard for the opinions of the many other courts which have grappled with the problems here involved, and with full knowledge of the countless hours of research, heartache, and soul searching which have doubtless gone into them, this Court is compelled to say that the common characteristic of most of them is tunnel vision. In interpreting the mandate of *Green* "to come forward with a plan that promises realistically to work, and promises realistically to work *now*," they have tended to stress the same word stressed by the Supreme Court, and in doing so have focused exclusively on the school board defendant. If the school system involved is already at or near the tipping point, nothing is accomplished save the unfortunate results noted above in various of our major cities. As to the *Green* command, this Court prefers to stress its major thrust: promises realistically to *work*. (This Court's emphasis.)

Realistically, it is clear that the tipping point/resegregation problem would pale into insignificance if the Board's jurisdiction were coterminous with that of Uni-Gov. It would be minimized still further if extended to Lawrence, Beech Grove and Speedway City, and to certain parts of the adjoining counties practically indistinguishable from the City of Indianapolis, such as the Carmel area of Hamilton County and the Greenwood area of Johnson County. Certain legal questions immediately spring to mind which cannot, or at least should not be answered without the joinder of additional parties to this action.

Some of these questions are as follows:

1. Are Chapter 186 of the Acts of 1961, Chapter 52 of the Acts of 1969, and Chapter 173 of the Acts of 1969, or any of them, unconstitutional as tending to cause segregation or to inhibit desegregation of the Indianapolis School System?

2. If the answer to Question 1 is in the affirmative, did passage of the Uni-Gov Act automatically extend the boundaries of the School City coterminous with the boundaries of the Civil City, as provided generally by Indiana law?

3. If both of the foregoing questions are answered in the affirmative are Lawrence, Beech Grove, and Speedway city presently under the jurisdiction of the defendant Board, or does Uni-Gov merely have the effect of annexing the eight township school corporations?

4. Regardless of the answer to the first three questions, should the General Assembly, by appropriate legislation, provide for the creation of a metropolitan school district embracing all of Marion County, together with all or some substantial part of the other counties going to comprise the Indianapolis Metropolitan Statistical Area, in order to purge the State of its role in contributing to *de jure* segregation in the Indianapolis School System?[97]

5. If the answer to Question 4 is in the affirmative, and the General Assembly fails to act within a reasonable time, or in a reasonable way, does this Court have the power to create such a metropolitan school district by judicial decree?[98]

Other questions likewise require an answer:

6. Does the Metropolitan Development Commission of Marion County have the power to deny the School Board

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[97] The State has the undoubted power to abolish, consolidate, eliminate, or create new governmental corporations. Woerner v. City of Indianapolis, 1961, 242 Ind. 253, 177 N. E. 2d 34.

[98] Is there, for example, an analogy between the power of the Court in desegregation cases, and the power of the Court in cases involving legislative or congressional redistricting, both of which arise out of the equal protection clause of the Fourteenth Amendment? cf. Baker v. Carr, 369 U. S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663; Reynolds v. Sims, 377 U. S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506.

its choice of sites for Crispus Attucks or other new schools? Put another way, does this Court have the power to override such Commission if it finds that its rulings interfere with desegregation?

7. Does this Court have the power to override rulings of the said Development Commission or of any other involved agencies with regard to the location of low-rent housing projects, if it finds that the locations of such projects interfere with desegregation, or tend to cause resegregation?

The plaintiff is ordered to proceed forthwith to prepare and file appropriate pleadings to secure the joinder herein as parties defendant of the necessary municipal corporations and school corporations which would have an interest in questions 1-5, inclusive, and to seek such relief as to the plaintiff seems justified. The defendant is ordered to proceed similarly as to those agencies which would appear to have an interest in questions 6 and 7, joining them as third party defendants. Because of the interest of the State of Indiana in the constitutionality of its laws, its Attorney General should also be served by the plaintiff.

Nothing herein should be construed as limiting the parties to consideration of the seven questions above suggested. Other questions may well occur to them which would involve additional parties, and if so they should feel free to proceed accordingly and to seek whatever relief seems appropriate.

Further, it may be that the opinions herein expressed, the questions herein propounded, and the orders herein made will cause individuals or bodies politic to desire to intervene herein. Petitions for intervention will be given careful consideration.

X. ORDER OF THE COURT

Finally, what is to be done pending decision of the questions above set out? The order of the Court in this regard is as follows:

It is hereby ordered that the defendants, their successors in office, officers, agents, employees and all those in active concert or participation with them, are permanently enjoined from discriminating on the basis of race in the operation of the Indianapolis School System.

It is further ordered that the defendants take, at a minimum, the following specified actions to fulfill their affirmative duty to achieve a nondiscriminatory school system:

(1) Immediately take steps to assign faculty and staff so that no school is racially identifiable from the racial composition of its faculty or staff. Mandatory assignments or reassignments are to be made if necessary, and the assignments to achieve full desegregation will be made prior to or with the opening of schools in September, 1971. This Court further notes that the evidence adduced in this cause shows that, in faculty and staff reassignment heretofore effected, these reassignments have tended to result in more experienced Negro faculty and staff being transferred and/or assigned to schools attended predominantly by white students and more inexperienced white faculty and staff being transferred and/or assigned to schools attended predominantly by Negro students. Defendants should, accordingly, redress or tend to redress this situation in making whatever assignments or reassignments that are necessary to comply with this order.

(2) Immediately continue with their plans to desegregate and relocate Crispus Attucks High School.

(3) Immediately amend the "majority-to-minority" transfer policy to conform to the requirements enunciated by the Supreme Court in *Swann*, so that such transfers are not to be dependent upon availability of space in the receiving school and so that transportation will be provided, upon request, to students making such transfers. Provided, however, that the Board may request authority to designate the transferee school or schools in the event that extreme diffussion of requests presents practical problems of transportation, or in the event that extreme concentration of requests threatens the racial stability of a given school, i.e., the tipping point factor.

(4) Immediately give all possible publicity to students and parents of students who may be eligible for transfer under (3), regarding the new policy.

(5) Immediately attempt to negotiate with the outside school corporations for possible transfer of minority race students to such outside schools, including high schools, for the coming school year.[99]

(6) Immediately resurvey the probable racial make-up of all schools for the 1971-72 school year, and take appropriate action to prevent schools, including high schools, now having a reasonable white-black ratio from reaching the tipping point. Transportation of students into or out of such schools shall be resorted to as required.[100]

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[99] If the outside school corporations have the capacity to accept transfer of white students, they have the capacity to accept minority race students. Further, the Board has available many portable classrooms and could, with a little imagination, "lend-lease" teachers, if necessary.

[100] This Court regards the outcry made in some quarters against "bussing" as ridiculous, in this age of the automobile. Most students in the outside school corporations have been bussed for years, with never a complaint against bussing per se. Students required to be bussed could be required to walk to their former schools for ease of pick-up and speed in delivery.

(7) Immediately cease and desist from going forward with construction of the Forest Manor School until the Court hears further evidence on this subject.

It is recognized that the orders thus far made will not result in significant desegregation of majority-black schools immediately, unless the voluntary transfer and outside school corporation transfer policies are unusually successful. It is also recognized that mandatory transfers to maintain stability pursuant to subparagraph (6) may largely involve Negro students, as is certain with regard to transfers to the outside school corporations. Neither of these facts seems "fair" in a theoretical sense, and have caused the Court a great deal of concern. However, there is a limit to what can be accomplished at one time, and final plans cannot be made until answers are found to the seven legal questions posed. Determination of such questions will be expedited to the utmost degree consistent with due process.

Meanwhile, the defendants are directed to file, on or before September 3, 1971, the plans they propose for the 1971-72 school year pursuant to the within order and on their own initiative, with the usual copies to counsel and amicus curiae, who shall have the right to object thereto and/or to make their own suggestions within ten days thereafter. Such plans shall include their current proposals regarding the site of and assignment of pupils to the proposed Forest Manor Middle School.

It is finally considered and adjudged that the defendant School Board pay the costs of this action.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

§ 1. **Citizenship—Due Process of law—Equal protection.**—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

§ 5. **Power to enforce amendment.**—The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 2000c

§ 2000c. Definitions

As used in this subchapter—

(a) "Commissioner" means the Commissioner of education.

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

(c) "Public school" means any elementary or secondary educational institution, and "public college" means any institution of higher education or any technical or

vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source.

(d) "School board" means any agency or agencies which administer a system of one or more public schools and any other agency which is responsible for the assignment of students to or within such system. Pub.L. 88-352, Title IV, § 401, July 2, 1964, 78 Stat. 246.

§ 2000c-6.

(a) Whenever the Attorney General receives a complaint in writing—

> (1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, . . .

and the Attorney General believes the complaint is meritorious and certifies . . . that the institution of any action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to

this section, provided that nothing herein shall impower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

IC 18-4-3-14

. . .

All other municipal corporations, boards, agencies and commissions created by applicable law, or by any ordinance until such ordinance is amended, shall not be affected by this act, except to the extent that such powers are transferred to the consolidated city or department thereof or are otherwise limited under this act. Without limiting the generality of the following enumeration, such municipal corporations, boards, agencies, authorities and commissions shall include: airport authority and board established pursuant to Acts 1961, c. 283 [§§ 14-1301—14-1336]; health and hospital corporation and board established pursuant to Acts 1951, c. 287 [§§ 35-902—35-950]; county department of welfare and board established pursuant to Acts 1936 (Spec. Sess.), c. 3 [§§ 52-1001, 52-1101—52-1130, 52-1201—52-1280m, 52-1301—52-1315, 52-1401—52-1417]; c. 119 [§§ 22-2801—22-2819]; building authority, board of trustees and board of directors established pursuant to Acts 1953, c. 54 [§§ 26-2501—26-2523]; capital improvements board of managers established pursuant to Acts 1965, c. 326 [§§ 26-2801—26-2821]; housing authority established pursuant to Acts 1937, c. 207 [§§ 48-8101—48-8127], except to the extent expressly limited or changed

by Article VIII [§§ 48-9326—48-9339] of this act; library districts and boards thereof established pursuant to Acts 1947, c. 321 [§§ 41-901—41-921]; and any school corporation, all or a part of the territory of which is in the consolidated city or county. Where, however, after the effective date [January 1, 1970] of this act, the power to make an appointment to the governing body or any other board connected with such board, agency or commission, or the power to take any action in connection with the operation of such board, agency or commission, is vested in the county council of the county or the common council of the first class city, such power shall be vested in the city-county council. [Acts 1969, ch. 173, § 314, p. 357.]

18-4-12-6 [48-9406]. Police division—Definitions—As used in sections 1206 through 1233 [18-4-12-6—18-4-12-33] of this article, the following words and phrases shall have the following meanings:

(a) "Consolidated City Police Force" or "Force" shall mean the police division of the department created under this act [18-4-1-1—18-4-15-2].

(b) "Police Special Service District" shall mean a special service district in which the consolidated city police force created under this article [18-4-12-1—18-4-12-59] shall have jurisdiction. At the effective date [January 1, 1970] of this act such police special service district shall be coterminous with the boundaries of the first-class city as the same existed on the day preceding the effective date of this act, but may be expanded by the city-county council in accordance with this article. At the time that the boundaries of such police special service district become coterminous with the boundaries of the consolidated city, the police special service district may be dissolved by the

director and such district shall be a department of the consolidated city.

(c) "Advisory Commission" shall mean the consolidated city police advisory commission created under this act.

(d) "Chief" shall mean the chief executive officer of the consolidated city police force who is appointed pursuant to this act.

(e) "Merit Board" shall mean the consolidated city police force merit board appointed under this act.

(f) "Interview Board" shall mean the consolidated city police force interview board appointed under this act.

(g) "Member of the Police Force" shall mean a regularly employed police officer of the force. [Acts 1969, ch. 173, § 1206, p. 357.]

18-4-12-7 [48-9407]. Authority and jurisdiction—Duties of sheriff.—The police division of the department shall be known as the Consolidated City Police Force of _____. The authority and jurisdiction of such consolidated city police force shall extend throughout the territory of the police special service district, as the same may exist from time to time, and the sheriff and the sheriff's department of the county shall continue to have the same authority and jurisdiction as presently exists for the sheriff of such county until such police special service district is extended as provided in section 1208 [18-4-12-8] of this article.

After extension of the force to include the entire consolidated city, the duties of the county sheriff shall consist of carrying out his civil functions, maintaining order in the courts and at public hearings, enforcing the process

and orders of the courts, administering the jails in the county and the prisoners therein, transporting prisoners and maintaining the security of public property, including but not limited to the county home, juvenile center and guardian's home and the sheriff may appoint deputies for the purpose of assisting him in performing these duties. [Acts 1969, ch. 173, § 1207, p. 357.]

18-4-12-34 [48-9441]. Fire division—Definitions.—As used in sections 1234 through 1243 [18-4-12-34—18-4-12-43] of this article, the following words and phrases shall have the following meanings:

(a) "Consolidated City Fire Force" or "Force" shall mean the fire division of the department created under this article [18-4-12-1—18-4-12-59].

(b) "Fire Special Service District" shall mean a special service district in which the consolidated city fire force created under this article shall have jurisdiction. At the effective date [January 1, 1970] of this article, such special service district shall be coterminous with the boundaries of the first-class city as the same shall have existed on the day preceding the effective date [January 1, 1970] of this act, but may be expanded by the city-county council in accordance with this article. At the time that the boundaries of such fire special service district become coterminous with the boundaries of the consolidated city, the fire special service district may be dissolved by the director and such department shall be a department of the consolidated city.

(c) "Advisory Commission" shall mean the consolidated city fire advisory commission created under this article.

(d) "Chief" shall mean the chief executive officer of the consolidated city fire force who is appointed pursuant to this article.

(e) "Merit Board" shall mean the consolidated city fire force merit board appointed under this article.

(f) "Interview Board" shall mean the consolidated city fire force interview board appointed under this article.

(g) "Member of the Fire Force" shall mean a regularly employed fireman of the force. [Acts 1969, ch. 173, § 1234, p. 357].]

18-4-12-35 [48-9442]. Fire division—Name—Jurisdiction.—The fire division of the department shall be known as the Consolidated City Fire Force of ————————. The authority and jurisdiction of such consolidated city fire force shall extend throughout the territory of the fire special service district, as the same may exist from time to time, and the township trustee of townships within the consolidated city but outside the fire special service district, shall continue to have the same authority and jurisdiction relating to fire protection as presently exists for the trustee of such township. [Acts 1969, ch. 173, § 1235, p. 357.]